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APPROVED FORMS, TAKEN FROM
ACTUAL CHARGES, OF

INSTRUCTIONS TO JURY

BOTH CIVIL AND CRIMINAL

(UNDER THE OHIO CODE)

By

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Judge Court of Common Pleas; Professor of Law, Ohio State
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*"If there is anything eminently and exclusively
our own, it is our system of Legal Procedure."*

(Ranney)

Cincinnati, Ohio

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PREFACE

One of the most difficult and important tasks in trial work is that of preparation of Instructions to the Jury. It may not be inappropriate to observe that this fact is more keenly appreciated by a trial judge. While it may become easier with experience the difficulty and importance will constantly appear in new cases.

The forms of instructions contained herein have in the main been taken from the original charge of the trial judge, using his language excepting with slight modifications. They have been taken from printed records, and from transcripts from original cases that may not have gone to the court of last resort. A note at the end of each form indicates the case from which it is taken, and the judge who gave it, and if it has been approved the fact is stated. There is a marked difference between a form taken from an actual charge and one framed in the abstract from decisions. Both kinds appear in the volume.

E. B. KINKEAD.

June, 1914.

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PART II.

Instructions to Jury—Civil and
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CHAPTER LXIV.

PROVINCE OF COURT AND JURY.

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| SEC. | SEC. |
| 1456. Relation of court, jury and attorney—Zeal of counsel. | 1458. Appropriate remarks in the opening of a charge. |
| 1457. Introductory in criminal case—Province of jury to ascertain truth—Province of court—Of attorneys. | 1459. Another form of opening statement. |

Sec. 1456. Relation of court, jury and attorney—Zeal of counsel.

For fear that the heated, overweaning zeal of counsel may tend to lead some of you away from the dignity and importance of a judicial trial, and your positions and duties as jurors, you are admonished that you should not by any means be misled from the calm, staid, intelligent, impartial consideration of the matter submitted to you. The discharge of your duties is a matter of very grave moment not only to the parties to the suit, but to the public welfare. The amount involved is of great consequence to the parties, but the righteousness of the proceedings of this court is of much greater importance.

The duties of the court and yourselves are decidedly different from those of the attorneys, who frequently in their zeal, on the spur of the moment, go beyond what they would approve in their deliberate moments.

It is one of the fundamental maxims of our profession, that the lawyer must be true to his client, loyal to his every interest, and that he must permit no stone to be unturned in his efforts to see that the right of his client is properly vindicated, and if some do exercise more zeal than judgment, a zeal that never ought to affect you, and never ought to affect the court. Your

duty is to determine from the evidence in the case, what the facts are and where the rights of the parties lie, irrespective of party, without fear, feeling or favor. Both parties to this contention and the public look to you, gentlemen, to discharge your duty in a dignified, self-respecting manner, to discharge it so that confidence may be properly reposed in your final determination of the issues submitted to you; and that the dignity and righteousness of the administration of public justice by the court be exalted and loyally be upheld by you. The court as the representative of the law desires that you should enter upon your deliberations and discharge your duties in that spirit, and only in that spirit.

Sec. 1457. Introductory in criminal case—Province of jury to ascertain truth—Province of court—Of attorneys.

You have heard the evidence offered before you on both sides of the case. From that evidence you learn what the facts are; you extract the truths of the case. That is your province. But you are not able by those facts, those truths, alone, to arrive at a verdict; because there is something else that enters into the verdict, and that is the law that is applicable to the facts, to the truths. These two elements enter into and make up every verdict of a jury. It is from the court, and from no one else, that you receive the law.

It is the express duty of the court—commanded by statute—to charge you as to the law of the case; to inform and instruct you what are the elements of the crime of which the prisoner is accused; what is the measure or quantity of the evidence necessary to convict him; what evidence is insufficient to convict him; and for what purpose some, or all, of the evidence introduced is to be applied by you; and it is your imperative duty to conform your findings to these instructions.

It is the privilege of the court, in charging you, to sum up the evidence, to review the facts, in order to aid you in the ascertainment of the truth, but not to usurp your province and

prerogative; for there is nothing which the court may say that can absolve you from the duty of finding the facts for yourselves.

Therefore if, in this charge, there should be a review of any of the facts, you will remember that it is not binding on you in the manner that the instructions touching the law are, but that it is only advisory, to aid you; and that you are left with entire freedom, and a perfect obligation resting upon you, to decide the questions of fact for yourselves.

This is a case of unusual magnitude. It is not surprising, therefore, that the attorneys, in their anxiety and zeal, should have urged upon you some topics and considerations which have no pertinence to the case, and which should have no influence upon the minds of oath-respecting jurors when they come to determine the case.

The attorneys had a wide range of discussion. They had the fullest freedom of argument before you upon every question of fact, and before the court upon every question of law. It was their privilege to analyze the evidence; to arraign the conduct of the prisoner and O. (the deceased), and all others concerned in the transaction which has been investigated; to characterize and impugn their motives, if the evidence justified it; to assail the credibility of the witnesses who were, either directly or indirectly, impeached; and to give full play to their wit and imagination in the illustration and adornment of their argument. But this does not mean that they had the right to make statements of facts not sustained by the evidence or to urge upon you considerations outside the case.

Open and explicit appeals were made by them to your sympathy, to your commiseration; pathetic allusions were made to the distressed and sorrowing families of those who were concerned in the transaction under investigation.

You must exclude from your minds, promptly, manfully and absolutely, all impressions and convictions which may have found lodgment there, either consciously or unconsciously, that are not made by the evidence or the law. When you come to the consideration of this case upon its merits, you should not permit

the suggestions, allusions, statements and arguments about the distress and sorrow of the families interested, and about the contents of said articles to have any weight or influence upon your minds. Lay them aside as wholly irrelevant to the issue, which must be considered and determined by you strictly upon the evidence introduced and the law given to you by the court. With the consequences of your verdict you should not be concerned. The evidence, with such reasonable deductions as may properly be drawn therefrom, together with the law of the court's charge, should alone be looked to in reaching your conclusions and in arriving at your verdict.

With the dispensation of mercy you have nothing to do. You the ministers of justice and not of mercy. The administration of mercy is a function that belongs to the governor of the state, aided by the board of pardons.

In a civilized state like this, it is absolutely essential to the preservation of social order that the law should be enforced, and especially in cases where acts of violence have been done. The laws must be obeyed, violators of the law must be punished; and you as jurors would be faithless to your trust if you should return a verdict of acquittal in this case when the facts demand a conviction of the prisoner.

It is equally important that innocence should not be punished. You were impaneled, not for vengeance, but to subserve the ends of public justice; and you would be disloyal to your obligations if you should find the prisoner guilty when the evidence required his acquittal.

This much has been said to impress you with a sense of the responsibility which you owe to your consciences and oaths, that your verdict should be honest, intelligent and in conformity to the evidence and the law.

Sec. 1458. Appropriate remarks in the opening of a charge.

“The court knows of no more important public duty than you are now engaged in. You constitute an indispensable part of the court whose offices are just as important and dignified as

those of the judge presiding. The courts thus constituted are the supreme power that finally determines all litigated contentions, and to whose power all the people and every public officer of the state must yield. Hence you see that the people justly take a deep interest in the determinations of jury trials. Public confidence is strengthened or shaken as the jurors discharge intelligently or loosely their duties. I make these suggestions because I want to impress upon your minds that the final duty which you are about to perform is one of very great importance, and one that deeply concerns the public welfare as well as the litigating parties. You have been carefully selected from the citizens of the county because of your special fitness and qualification to discharge these important duties. It is fair to say that the experience of mankind goes to show that the candid, impartial judgment of ten or eleven men is a safer guide than that of one or two, equally candid, intelligent and impartial men; and, while one or two men may be right in their convictions, yet it is safer for them to consider well the sources of their convictions before they finally decide against the agreement. Yet every juror should feel that it is his duty not to yield a well-grounded conviction because it does not accord with the convictions of his fellow jurors. Both parties to this action are entitled to the independent and best judgment of each juror. A disagreement should not be had when an agreement can be reasonably secured by an impartial, candid and fair concurrence of the individual judgment of each juror. You may well remember that if this jury disagree, that this contention must be settled finally by a jury of twelve men, in no respect better qualified to try the issue of fact than you are, and upon no better presentation of the case to them. An honest, candid and independent discussion leads to truth, heated controversy, to disagreement.

Sec. 1459. Another form of opening statement.

Before you enter upon the discharge of your duty in the premises, it is enuncumbent upon the court to assist you by giving you certain instructions upon the law that it considers applicable

to this case. There can be no doubt whatever in your minds as to whether the court is correct or not in its conclusions and instructions respecting the law. It is the duty of the court to instruct you in this respect, and it is your duty to act in accordance with those instructions. If the court should err in its statement of the law, it does not concern you, for there is a remedy provided for reviewing the action of the court by a higher tribunal, and correcting any errors that may have been made. You must, therefore, take the law as given you by the court.

You are the tryers of the facts, and in that respect the court has no supervision over you. The individual judgment of the juror acting candidly is the only guide for him in determining the facts in this case from the evidence. If the court has made any statement of fact resulting, or to be drawn from the testimony, it is an oversight and should not be considered by you. The court has no right or business to intimate to you any conclusion of fact drawn from the testimony that you are to consider, nor have you any right to form an opinion whatever as to what the court may think of the facts, or as to which had the approval in this case. Very frequently jurors will watch very closely to discover, if possible, what may seem to be the bent of the court's mind upon the facts, so as to discover what the court thinks about them. This you must steadily refrain from doing, as it matters not what the court may think about the facts. The law very properly has made twelve men an essential constituent part of the court, whose duty in determining the facts is as important as that of the court trying the case and determining the law applicable to it. And you are to exercise in all your deliberations, the judgment of candid, intelligent men, who are anxious only to get at the truth. You should be especially careful that you be guided, in the conclusion to which you come, by the evidence submitted to you and the instructions of the court, and nothing else. The public welfare depends more upon the intelligence and impartiality and just deliberation of the jurors in the cases submitted to them than upon the discharge

of any other public duty that falls to your lot. If you discharge your duties well, if you challenge the respect of the community by the justice, intelligence and impartiality of your decision made, you will command the respect and confidence of the people in our courts. It is of prime consequence that jurors should be grave, that they respect, and, while respecting a sense of public justice, that they exalt the administration, so that neither party shall have any cause to feel that their case has not been impartially and fairly considered.

CHAPTER LXV.

ABORTION.

SEC.	SEC.
1460. Abortion by physician—General charge.	1462. Testimony of husband as accomplice.
1. Statement of charge.	1463. Belief that uterus contained dead foetus.
2. Provision of statute—Essential elements of crime.	1464. Presumption of innocence continues until verdict.
3. Intent with which drug administered.	1465. Unwise to convict on uncorroborated testimony of accomplice.
4 Claim that drug administered to relieve of dead foetus.	1466. Reasonable doubt as to intent—Reasonable probability of innocence creates reasonable doubt.
5. Good character of practitioner.	
1461. Elements of crime.	

Sec. 1460. Abortion by physician—General charge.

1. *Statement of charge.*
2. *Provision of statute—Essential elements of crime.*
3. *Intent with which drug administered.*
4. *Claim that drug administered to relieve.*
5. *Good character of practitioner.*

1. *Statement of charge.* The defendant here on trial is J. W. T. The crime charged in the first count of the indictment is that the defendant caused the death of one N. E. by administering a certain drug called chloroform to the said N. E., with intent on the part of the defendant to procure a miscarriage of said N. E.

2. *Provision of statute—Essential elements of crime.* It is provided by the statute of this state that "whoever with intent to procure the miscarriage of a woman prescribes or administers to her a medicine, drug or substance, or with like intent uses an instrument or other means, unless such miscarriage is necessary

to preserve her life, or is advised by two physicians to be necessary for that purpose, if the woman either miscarries or dies in consequence thereof, shall be'' punished as provided by statute.¹

To constitute the offense charged in the said first count of the indictment, it is essential that the proof show that on or about the time named in the indictment the defendant unlawfully, willfully and knowingly did administer or cause to be administered, and caused to be taken by the said N. E.—the said N. E. being then and there pregnant with child—a certain quantity of a certain poisonous drug, to-wit, a drachm more or less of chloroform; that said chloroform was then and there administered to the said N. E. by the defendant with the intent on the part of the defendant then and there to procure a miscarriage of the said N. E.; that said miscarriage was not then and there necessary to preserve the life of the said N. E., and then and there had not been advised by two physicians to be necessary for said purpose; that in consequence of the administering of said chloroform to said N. E. the said N. E. then died.

One of the essential elements of the offense here charged is the intent with which the defendant administered or caused to be administered and taken said chloroform to the said N. E.

3. *Intent with which drug administered.* The intent with which an act is committed being but a mental state of the accused, direct proof is not required nor can it ordinarily be so shown, but intent is generally established by all the facts and circumstances attending the doing of the act complained of as shown by the evidence.

If the defendant administered or caused to be administered to said N. E. at said time and place such chloroform—if said N. E. was then and there pregnant—you will then inquire for what purpose said chloroform was administered to the said N. E.

If you find from the evidence that the defendant, on or about the time and place named in the indictment, either himself, or if he caused or directed another person so to do—that is, to administer chloroform to N. E.—if N. E. was then and there pregnant with child—then you will find and determine from the

evidence under the instructions of the court for what purpose such chloroform was administered to the said N. E.

If you find by the evidence that the purpose and intention of the defendant was then and there to procure a miscarriage of the said N. E., and if the administration of said chloroform was one of the means or agents employed by the defendant in the execution of the intention on his part to procure a miscarriage of the said N. E., and if you find that in consequence of the administering of said chloroform to said N. E. by the defendant—if such you find—with the intent aforesaid, and if the said N. E. then died, and if you further find that such miscarriage was not necessary to preserve the life of the said N. E., or had not been advised by two physicians for that purpose, then the defendant would be guilty of the offense charged.

4. *Claim that drug administered to relieve of dead foetus.* The defendant claims that he caused to be administered to the said N. E. said chloroform in order to relieve the said N. E. of what he believed to be a dead foetus, to remove such from the uterus, and claims that he had no purpose or intention to procure a miscarriage on the said N. E. If you find that the defendant had no intention at said time and place to procure a miscarriage on said N. E. when he administered such chloroform to her, or caused such chloroform to be at said time administered to her, then you should acquit him. If the removal of said foetus was then necessary to preserve the life of the said N. E.—if such you find—the defendant would not be guilty of the crime here charged, and you should so find.

5. *Good character of practitioner.* Some evidence has been adduced by the defendant tending to show his previous good character as an honest practitioner in the practice of medicine, and that evidence you are to consider in the case precisely the same as the rest of the testimony. A defendant in a criminal case has the right to put in evidence concerning his former good character, that is, his previous life. It is evidence tending to raise a probability that one who had such a character would not commit a crime. It is not, however, conclusive. It is simply evidence to be considered with all the other testimony in the

case for the purpose of determining whether the proof taken as a whole establishes his guilt beyond a reasonable doubt. If it does not, even this evidence may of itself create a reasonable doubt, and if it does, he is entitled to the benefit of that doubt, but if, when you come to take the evidence of character, together with all the other testimony submitted for your consideration, you are satisfied when you look at it and consider and weigh the effect upon your minds and judgment, if, ultimately, your minds are convinced beyond a reasonable doubt that the defendant is guilty, then, notwithstanding his standing and position in the community—that is, his previous good character, he is guilty of the crime, it is your duty to so pronounce by your verdict.²

¹ Code, sec. 12412.

² *State v. Tippie*, Franklin County Com. Pl., Evans J. Affirmed, 88 O. S. —.

Sec. 1461. Elements of the crime.

The jury is instructed that if you find from the evidence in this case beyond a reasonable doubt that the deceased, N. E., at the time stated in the indictment was a woman pregnant with child; and that the defendant administered to the deceased, or ordered it to be administered to the deceased, with the intent to procure a miscarriage, that is, with the intent that either the chloroform itself should produce a miscarriage, or that by its influence as an anaesthetic and with the use of any other instrument or means he might procure a miscarriage, and such miscarriage was not necessary to save the life of the deceased, and was not advised by two physicians to be necessary for that purpose, and that the deceased died in consequence of the chloroform administered or ordered to be administered by the defendant with the intent to procure such miscarriage, then the defendant would be guilty under the first count in the indictment, and you ought by your verdict to say so.¹

¹ Request by State given in *State v. Tippie*, Franklin Co. Com. Pl., Evans J. Affirmed, 88 O. S. —. If death results when drug administered without intent to kill, but to procure miscarriage, it is abortion. *Robbins v. State*, 8 O. S. 131. Offense complete if drug administered with such intent at any time during gestation. *Wilson v. State*, 2 O. S. 319.

Sec. 1462. Testimony of husband as accomplice.

It is the duty of the court to charge you that you ought not to convict upon the uncorroborated testimony of an accomplice. If you find that there is no other evidence of the commission of this crime against the defendant than that which comes from the husband of the deceased, you ought not to convict the defendant, although you may properly do so if the evidence in the case convinces your minds beyond a reasonable doubt of the guilt of the defendant.

I also charge you in this regard that it is not necessary, in order to corroborate an accomplice, that the crime charged be proven independently of the testimony of the husband, or that the testimony of the husband should be corroborated in every particular in order that it may be said to be corroborated; but it is only necessary that there should be circumstantial evidence or testimony of some witness other than the husband tending to connect the defendant with the crime charged and to prove some of the material facts testified to by the husband. And you may find the husband's testimony to be corroborated if you find facts and circumstances independent of his testimony tending to suggest the probability that the defendant committed the crime charged in the indictment.¹

¹ Request by State given in *State v. Tippie, supra.* Evans J.

Sec. 1463. Belief that uterus contained dead foetus.

The defendant's belief that the uterus of Mrs. E., the deceased woman, contained a dead foetus is not sufficient of itself to justify the procuring of a miscarriage under the laws of this state; neither will this belief exonerate the defendant from prosecution under our statutes for causing the death of a woman in consequence of a drug administered with the intent to procure a miscarriage.¹

¹ Request by State given in *State v. Tippie, supra.*

Sec. 1464. Presumption of innocence continues until verdict.

You are instructed by the court that where a person is charged with crime the law presumes the accused to be innocent; and this

presumption of innocence does not cease when the jury retires. This presumption of innocence accompanies the accused through the trial down to and until the jury reach a verdict, and it is the duty of the jury, if possible, to reconcile the evidence with this presumption.¹

¹ State v. Tippie, *supra*.

Sec. 1465. Unwise to convict on uncorroborated testimony of accomplice.

The witness, A. H. E., admitted in his testimony that he was an accomplice in the crime charged in the indictment, and the court says to you that it would be unsafe and unwise for the jury to convict the defendant upon his uncorroborated testimony.¹

¹ Request by defendant given in State v. Tippie, *supra*, and affirmed, 88 O. S. —.

Sec. 1466. Reasonable doubt as to intent—Reasonable probability of innocence creates reasonable doubt.

Before the jury would be warranted in returning a verdict of guilty, you must find from the evidence beyond a reasonable doubt that the defendant intended to procure the miscarriage of one N. E. at or about the time alleged, and by the means alleged in the indictment.

It is not necessary that the jury should be satisfied that the defendant is innocent to justify a verdict of not guilty, but it is necessary that all the jurors should be convinced beyond a reasonable doubt that he is guilty before a verdict can lawfully be rendered against him.

If there is any reasonable probability of the innocence of the defendant, then a reasonable doubt of his guilt exists, and the jury must find a verdict of not guilty.¹

¹ Request by defendant given in State v. Tippie, *supra*.

CHAPTER LXVI.

AGENCY.

SEC.

1467. What constitutes agent.

1468. Special or general agent.

1469. Principal estopped to deny agency, when person placed in position from which another is justified from usage and nature of business in believing agent authorized.

SEC.

1470. No ratification without knowledge of facts.

1471. Ratification with knowledge—Cannot disavow part.

1472. Right to recover where double agency known to principal.

Sec. 1467. What constitutes an agent.

You are instructed that an agent is one who acts for another by the authority of the principal, one who is entrusted with the concerns of another, and whatever he does as such agent, within the scope of the authority conferred on him by the principal, is as much the act of the principal as if done by the principal himself. In such case his acts are the acts of the principal.

Sec. 1468. Special or general agent.

A person may act for himself, or he may act through another. If he acts through another, that other is called the agent, and he is called the principal. The power of the agent may be general or it may be special. It is general when the agent is empowered to do a particular thing or many things in any way necessary or proper to accomplish the end. It is special when the agent is empowered to do a particular thing or many things in a limited way. The jury must determine the character of the agency from the testimony. In general, the principal is bound if the agent exceed his authority, and the other party did not know it. If special, the agent must follow his instructions, else the principal will not be bound.¹

¹ A correct charge given in a proper case; but held no occasion for giving it, in *McGee v. Wells*, 57 S. C. 280; 76 Am. St. 567.

Sec. 1469. Principal estopped to deny agency, when person placed in position from which another is justified from usage and nature of business in believing agent authorized.

The jury is instructed that where a principal has by his voluntary act placed an agent in such situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform on behalf of his principal a particular act, such particular act having been performed, the principal is estopped as against such innocent third person from denying the agent's authority to perform it.

It is an obvious limitation upon the liability of the principal that he who deals with the agent must deal in good faith, respecting every restriction upon the agent's authority of which he may have notice.¹

¹ *General Cartage Co. v. Cox*, 74 O. S. 284, 294.

Sec. 1470. No ratification without knowledge of facts.

The jury is instructed that where a person assumes without authority to act as the agent of another, the principal can not be bound by such act at all unless he ratifies the same. The principal is not bound by unauthorized agreements of a special agent by the acceptance of benefits derived therefrom, unless he ratifies the same with full knowledge of all the terms and conditions.¹ Before a person can be bound by ratification of an act done in his behalf, it must appear that he was informed of all the material facts in the transaction.²

¹ *Roberts v. Rumley*, 58 Iowa, 301. See Am. Ann. Cases 1913, E. Note, 1115.

² *Kerr v. Sharp*, 83 Ill. 199.

Sec. 1471. Ratification with knowledge—Cannot disavow part.

The prior appointment of, or the subsequent ratification of the acts of a third person as agent, will confirm and establish the authority of the agent, and generally, if the party receives and holds the proceeds of the beneficial results of the contract, with

knowledge of the material facts, he will not be permitted to deny the authority of the agent, for it is in fact the ratification of the contract. The principal can not in general adopt a part and disavow a part of the contract of the person who proposes to be his agent. This should be received, however, with the qualification that the principal must have knowledge of the material facts to bind him.¹

¹ *Voris, J., in Valley Railroad Company v. The Thomas Lumber and Building Co., Summit Co. Com. Pl. Affirmed by Circuit Court.* Ratification is a question of fact for the jury. *Middleton v. R. R. Co., 62 Mo. 579; Fisher v. Stephens, 16 Ill. 397.* A principal can not adopt part without adopting the whole. *Winpenny v. French, 18 O. S. 469; 34 O. S. 450.* Full knowledge is necessary. *Wilson v. Forder, 20 O. S. 89, 97.* It will not be implied from acts done in ignorance. *Grant v. Ludlow, 8 O. S. 1, 19; 24 O. S. 67.*

Sec. 1472. Right to recover where double agency known to principal.

If the defendant employed the plaintiff to act as his agent in the exchange of property mentioned in the petition for a farm owned by another, or employed him to aid and assist in such exchange, and agreed to pay him a certain per cent. as commission on the property, and at the same time knew that the plaintiff was the agent of the owner of the farm which defendant was seeking to obtain, and that plaintiff was acting as the agent of said owner, and the defendant assented thereto and agreed to pay the commission, and the owner of the farm knew that plaintiff was acting as agent of the defendant in the exchange, and assented thereto, agreeing to pay the plaintiff the commission stipulated in the written contract of agency, the plaintiff is entitled to recover.¹

¹ *Beil v. McConnell, 37 O. S. 396.*

CHAPTER LXVII.

AIDER AND ABETTOR.

SEC.

1473. Must be conspiracy or overt act.

1474. One present without knowledge of conspiracy.

SEC.

1475. Aider and abettor—Charge in case of homicide.

Sec. 1473. Must be conspiracy or overt act.

In the absence of a conspiracy, one who is present when a homicide is committed by another upon a sudden quarrel, or in the heat of passion, is not guilty of aiding and abetting the homicide, although he may have become involved in an independent fight with others of the party of the deceased, unless he does some overt act with a view to produce that result, or purposely incites or encourages the principal to do the act; and so in this case, if you find the defendant on trial, although present at the time of the shooting, knew nothing of his son H. having a revolver, or intending to shoot, and took no part in the killing, and did no overt act to produce that result, then he is in no way responsible, and must be acquitted, unless you find from the evidence, and beyond a reasonable doubt, that the shot was fired by H. in pursuance of a conspiracy previously formed by them.¹

¹ Woolweaver v. State, 50 O. S. 277, 287.

Sec. 1474. One present without knowledge of conspiracy.

“It is not sufficient to establish the guilt of a defendant in aiding and abetting the principal in the commission of the homicide charged in the indictment, that he was present with others where the alleged killing was done, for he may have been present not knowing that any crime was about to be committed;

and if he was not there in furtherance of an understanding or common purpose to commit some unlawful act, and was in company with the principal without knowledge that the commission of an offense was contemplated by the principal or any of his co-defendants, he is not responsible for the acts of the principal or his other co-defendants if he, the defendant, did not participate in the commission of the crime charged.”¹

¹ *Goins v. State*, 46 O. S. 457.

Sec. 1475. Aider and Abettor—Charge in case of homicide.

It is one of the fundamental, as it is one of the most familiar, principles of criminal law, that when a criminal act is done by one of two accused persons, as, for instance, shooting and taking the life of a third person, and the other accused person is present when the criminal act is done, and by words, acts or gestures, aids, assists and encourages the other to do the criminal act, then both are responsible and guilty as principals; and that is true, notwithstanding the fact may be that a previous conspiracy had not, by them, been formed to kill the person who was then killed.¹

And it is also true, notwithstanding the two accused persons lawfully came together at the time and place of the shooting. The fact that they lawfully came together, then and there, could not, in law, diminish or mitigate the criminality of the shooting, if it was criminal, which was afterwards done. According to old definitions, he who actually commits or takes part in the actual commission of a crime, is a principal of the first degree, and he who aids or abets the actual commission of the crime is a principal of the second degree. Since our statute, which places both of these classes in the same category, was passed, the old definitions are of no practical use except to explain the meaning of terms used. The reason of this law making both of the persons named guilty, is that the will of the accused person, who did not do the shooting, contributed to the result produced by the shooting, the death of the person shot. His guilt, therefore, is the same as if he himself did the criminal

act. The revolver, or pistol, or gun out of which the fatal shot was fired, was the pistol, or revolver, or gun of both of them, although only one of them owned, held and directed it when it was fired.

To render the accused person liable who simply gives aid and encouragement, but did not do the criminal act, responsible and guilty, it is not necessary that he should have been strictly, actually, and immediately present when and where the shooting was done, in the sense that he was an eye or ear witness to what passed.²

If he was sufficiently near to give the aid and encouragement and help to the other, that was enough. His mere presence, however, was not sufficient to make him an accomplice. He must have done something more. He must have incited, or assisted, or encouraged the other person to do the criminal act in one of the ways mentioned. In this instruction the court has only elaborated and expounded to you a statute of the State of Ohio, which declared: "Whoever aids, or abets, or procures another to commit any offense, may be prosecuted and punished as if he were a principal offender."³

¹ To constitute one who is present, and who becomes involved in a fight, which results in death of the antagonist, an aider and abettor, it should appear either that there was a prior conspiracy, or *that he purposely incited or encouraged the slayer, or did some overt act himself, with intent to cause the death of his antagonist.* Woolweaver v. State, 50 O. S. 277. The charge as we have given, might be modified to comply with the decision just quoted; although the remainder is a compliance with the rule.

² Warden v. State, 24 O. S. 143.

³ State v. Elliot, Franklin County, Pugh, J.

CHAPTER LXVIII.

ALIBI.

SEC.

1476. Alibi defined—Proof thereof.

SEC.

1477. Character of proof.

Sec. 1476. Alibi defined—Proof thereof.

The defendant, under the plea of not guilty, and as an independent defense, says that he was at another place, and therefore could not have taken the property named in the indictment. This is what is termed in law an *alibi*. *Alibi* is a *Latin* word signifying elsewhere, and in law means a defense interposed by the defendant by which he attempts to prove that at the time of the commission of the offense he was at some other place than that where it was committed. An *alibi* is a legitimate and proper defense to make, and if satisfactorily made is conclusive. It is obviously essential to the satisfactory proof of an *alibi*, that it should cover the whole of the time of the transaction in question, or so much of it as to render it impossible that the prisoner could have committed the act. If the defendant was not at the place of the commission of the alleged crime, as a matter of course he could not have committed the crime himself by his own hands. Whether or not the defendant has proved an *alibi* is a question of fact for the jury to determine; and in doing so you should look to and consider all the testimony upon that subject and which in any way tends to prove or disprove it.

Sec. 1477. Character of proof.

It is not required that the defendant prove this defense beyond a reasonable doubt, nor by a preponderance of evidence, to entitle him to an acquittal; it is sufficient if all the evidence raises a reasonable doubt of his presence at the time and place

of the commission of the crime charged; or in other words, you must determine from the whole evidence whether it was shown beyond a reasonable doubt that the defendant committed the crime with which he is charged.¹

“But the evidence must cover all the time during which the crime was committed. You should be fully satisfied by a preponderance of the evidence that these defendants were at H.’s, the place where they claim to have been at the time the crime was committed, all the time while the crime was being committed, or at such time that they could not, with any ordinary exertion, have reached the place where the crime was committed.”²

¹ *Walters v. State*, 39 O. S. 215; *State v. Harden*, 46 Ia. 623; *State v. Jaynes*, 78 N. C. 504. Failure to prove an *alibi* affords no presumption of defendant’s presence. *Toler v. State*, 16 O. S. 583.

² *State v. Hardin*, 46 Ia. 628. See instructions in *State v. Waterman*, 1 Nev. 543.

CHAPTER LXIX.

ALIENATION OF AFFECTIONS.

SEC.

- 1478. Consortium, right of.
- 1479. Malice as an ingredient of the wrong.
- 1480. Marital right gives exclusive right of intercourse.
- 1481. Acts of defendant must be malicious.
- 1482. Conduct of husband.
- 1483. Acts of parents—Rights and liabilities.
- 1484. Alienation by adulterous relations with wife.
 - 1. Marriage—Rights resulting therefrom.
 - 2. Adultery with wife—Essentials to recovery, and proof.
 - 3. Damages.
- 1485. Alienation of affections.
 - 1. Limitation of action for—Admission of acts prior to.

SEC.

- 2. Husband voluntarily bestowing affections on another—Must be wrongful act of defendant.
- 3. Relationship of husband and wife prior to act.
- 4. Malice.
- 5. Abandonment of husband not prerequisite of suit by wife.
- 6. Measure of damages.
- 1486. Claim of mistreatment of wife by husband.
- 1487. Connivance of, or encouragement by, plaintiff of alienation—Or his own misconduct bars recovery.
- 1488. Preponderance of evidence only, essential.
- 1489. Burden and character of proof of adultery.
- 1490. Measure of damages.

Sec. 1478. Consortium—Right of.

The action for alienation of affections is not in any sense for loss of support, or loss of earning capacity, but is wholly an action for damages for loss of consortium.

Consortium is defined to be, the conjugal fellowship of husband and wife, and the right of each to the company, co-operation and aid of the other in every conjugal relation.

This right is invaded whenever a third person through machination, enticement, seduction, or through other wrongful, intentional and malicious interference with the marriage

relation deprives the husband or wife of the consortium of the other.¹

Whatever invades the hallowed precincts of a home, and, without justifiable cause, by any means whatsoever severs the sacred tie that binds husband and wife, alienating the affections of either, and depriving either of the aid, comfort and happiness of a loyal union between them is liable in civil damages.²

¹ *Flandermeyer v. Cooper*, 85 O. S. 327.

² *Boland v. Stanley*, 88 Ark. 562, 115 S. W. 163, 129 Am. St. 114.

Sec. 1479. Malice as an ingredient of the wrong.

Though it is essential that the act of the defendant shall have been malicious in order to give rise to a cause of action, still this does not require that he shall have been actuated by ill will or actual malice towards the injured party; nor is it necessary that the act of defendant shall have been prompted by a spiteful, malignant or revengeful disposition. It is sufficient if the acts be wrongful, unlawful and intentional and the natural and probable result of the act to accomplish the injury of the loss of consortium, or alienation of affections.¹

¹ *Flandermeyer v. Cooper*, 85 O. S. 327; *Boland v. Stanley*, 88 Ark. 562; 115 S. W. 163; 129 Am. St. 114.

Sec. 1480. Marital right gives exclusive right of intercourse.

The right which is involved in this case is the marital right. When a man marries a woman he has certain rights to her comfort and to her society, and to the exclusive right of having sexual intercourse with her. And anyone who interferes with that right by committing any act knowingly and intentionally, commits an act which the law condemns.¹

¹ *Dent v. Zang*, Franklin Co. Com. Pl., Kinkead, J.

Sec. 1481. Act or acts of defendant must be malicious.

It has been held in this state that in order to warrant a recovery in this kind of a case that the act or acts on the part

of one charged with alienating the wife's affections, must be maliciously done. If a man intentionally has sexual intercourse with another man's wife, without the consent of the husband, he commits a wrongful act and he knows it. And the law then presumes from that wrongful act that he did it with malice. That is, the state of his mind is such that he acts without any regard whatever for the rights of others, and that is what we mean by malice in this kind of a case.

So if the jury should find from the evidence, and by a preponderance thereof, that the defendant in this case did commit the sexual act, and if you further find that by reason of the commission of that act and for no other reason at all, the plaintiff was deprived of the comfort and society, and of the rights that follow and attach to the marital relation, then, of course, you should find for the plaintiff and against the defendant.¹

¹ *Dent v. Zang*, *ante*, sec. 1480. The alienation must be the result of wrongful influences knowingly exerted by defendant with that end in view. *Smith v. Lammick*, 9 O. L. R. 87: 56 Bull. 220; *Flandermeyer v. Cooper*, 85 O. S. 327.

Sec. 1482. Conduct of husband.

Some evidence has been offered here which tends to bear upon the conduct of the plaintiff as a husband. I will say to you, gentlemen, that the conduct of the plaintiff in a case like this is a pertinent issue, and one which you may consider when there is any evidence which is offered that warrants your consideration thereof.

To hold a defendant in a case like this, the jury must arrive at the conclusion that it was the wrongful conduct of the defendant which resulted in the loss of consortium, or the loss of the society of his wife, and if it should appear that the conduct of a husband was of such a character and nature that it was the cause of the loss of his wife's society and that the other acts complained of by him as against a defendant charged with criminal conversation were not the cause, then, of course, there could not be any recovery.

But even under such circumstances where there may be some question raised as to whether or not both of these causes operated in the loss to the plaintiff of his wife's society, and if the jury should believe that the conduct of one charged with criminal conversation with his wife did operate, whether to any degree, or entirely so, or was the sole reason, the plaintiff would be entitled to recover under such circumstances even though his own conduct may have been in a measure partially the cause of the loss to him of his wife's society.¹

¹ *Dent v. Zang, supra.*

Sec. 1483. Acts of parents—Rights and liabilities.

The jury is instructed that the parents have the right to advise their son (or daughter) to leave his wife (or the daughter to leave her husband) if such advice is given with the proper motives and in good faith, and the same is founded upon conditions and circumstances honestly believed by them to be existing, and believing that the son's (or daughter's) best welfare will be furthered by such action. There is a natural presumption springing from the ties of blood that the acts of parents in so advising their child are in good faith and for the purpose of promoting the child's welfare unless the contrary is established by the evidence.

In order to recover for loss of consortium against the parents it is not only necessary to establish the fact that the parents caused the injury, but it must be made to appear also that in so doing they acted maliciously, that is, in bad faith, not with a view of promoting the son's (or daughter's) welfare.

If parents, having knowledge of a child's actual condition and situation in respect to the marital relation, or if they have such knowledge as to cause them to be reasonably apprehensive of the needs and welfare of their child and act in the honest belief that a course taken or advised is for the best welfare of such child, their acts cannot be deemed malicious, although such conduct in fact may appear to have been detrimental to the child's interest.

What a father or mother may do in respect to their married child so far as giving rise or inference to bad motive or intent is to be differently regarded than when the same thing may be done by a stranger. Parents may, to some extent, watch over the welfare of a married child; they may advise him (or, her) under some circumstances, contrary to the inclination of the husband, (or, wife) and even to the extent of advising desertion, and may act upon the mind of the child successfully to that end, if with proper motive and upon reasonably justifiable grounds.

The jury is instructed that in determining whether parents have acted improperly and in excess of their parental right, and are liable for wrongfully influencing their son (or, daughter) to leave his wife, (or, husband) the test is, whether in what they said or did, they were in fact, actuated with a reasonable parental regard for their child, and under circumstances reasonably and fairly warranting them in being reasonably apprehensive of the child's welfare; or whether they were actuated by unreasonable ill will towards the wife (or husband).¹

If the jury finds, etc.

¹ Jones v. Monson, 137 Wis. 478; 119 N. W. 179; 129 Am. St. 1082, and cases cited; Oakman v. Belden, 94 Me. 280; 80 Am. St. 396; Gernard v. Gernard, 185 Pa. St. 233; 64 Am. St. 646; Brown v. Brown, 124 N. C. 19, 70 Am. St. 574.

Sec. 1484. Alienation by adulterous relations with wife.

1. *Marriage—Rights resulting therefrom.*
2. *Adultery with wife—Essentials to recovery, and proof.*
3. *Damages.*

1. *Marriage—Rights resulting therefrom.* Marriage is an institution of society which is founded in a civil contract between the parties. That contract and the status resulting from it imposes certain duties upon the contracting parties and confers upon them certain valuable rights. One of these rights is that of exclusive marital intercourse with each other.

Each is entitled to the society and affection of the other. The rights of both spring from the marriage contract and in the very nature of things must be mutual. [Flandermeyer v. Cooper, 85 O. S. 327, 339.]

2. *Adultery with wife—Essentials to recovery and proof.* When, therefore, a man commits adultery with the wife, he has trespassed upon the rights of the husband, and for this wrong the law affords the husband a remedy by an action in damages. To entitle the plaintiff to recover, two facts must be proven by a preponderance of the evidence. First, the fact of marriage, and, second, the fact of adultery with the plaintiff's wife by the defendant. As to the fact of marriage, it may be proven by the testimony of any person who has personal knowledge of the fact of marriage. As to the proof of adultery, the proof need not be that of eye witnesses to the act of sexual intercourse, but may be established by proof of circumstances sufficiently strong to create a preponderance of the evidence in favor of the plaintiff's charge that the defendant committed adultery with his wife. In the proof of any fact in a civil action, it is sufficient if the evidence, whether direct or circumstantial, is sufficient to create a preponderance of the evidence in favor of the existence of the fact asserted, and when there is such a preponderance of the evidence in favor of the existence of the fact or matter asserted, that fact or matter is to be considered as proven.

To warrant a finding that the defendant committed adultery with the plaintiff's wife upon circumstantial evidence, the plaintiff must show a disposition on the part of the defendant and the wife of the plaintiff to have illicit intercourse and an opportunity to gratify that mutual inclination or disposition. It is not enough to show such a disposition on the part of the defendant alone or on the part of the plaintiff's wife alone, but such a disposition on the part of both of them, and, in addition, such a state of facts as would afford an opportunity to gratify their desires. This is a question of fact and must be determined by you from all the evidence before you, and if you find that

the defendant did have sexual intercourse with the plaintiff's wife, without the consent of the plaintiff, and without any connivance on plaintiff's part, then plaintiff is entitled to recover a verdict at your hands.

The gist of the offense here charged is the defilement of the marriage bed by the defendant. If it is proven by a preponderance of the evidence that A. P. was, at the dates complained of, the wife of the plaintiff, and that the defendant, without plaintiff's consent, committed adultery with her, then the plaintiff is entitled to recover.

This is true, even though you may find that she may have separated from him because of his own misconduct and not because of adulterous intercourse with the defendant. This results from the legal principle which I have already stated to you, to-wit, that such adulterous intercourse with a man's wife without his consent is an invasion of his legal rights and entitles him to recover damages, even though no separation may result on account of such wrongful conduct. If it results in separation and the loss of the comfort and society of the wife, this is, of course, a matter of aggravation to be considered upon the question of the amount of damages to be allowed. But the right to recover does not depend upon its being proven that the separation between the husband and wife was in fact due to the adulterous intercourse.

In an action of this kind, misconduct on the part of the husband will not bar his right of action, nor will the fact that the wife has obtained a divorce from her husband on account of his misconduct bar his right of action, but the conduct of the plaintiff as a husband is a material matter to be considered, and it is competent for the defendant in mitigation of damages to prove misconduct of the husband in his marital relation, and breaches of his marital obligations. Neither will the fact that the husband may have lived with his wife after he had knowledge of her misconduct with the defendant, if you find there was misconduct in the respects complained of, between the defendant and the plaintiff's wife, bar his right of action. While

that might show that he had forgiven her, it would not condone the offense of the defendant. But if you find that defendant did commit adultery with the plaintiff's wife and that plaintiff after he had knowledge of that fact continued to live with her for some time as his wife, that fact may also be considered by you in the mitigation of damages. But you are to remember that there can be no recovery in this case against the defendant in any amount unless you find that the charge made against the defendant that he committed adultery with plaintiff's wife is proven by a preponderance of the evidence. Unless that is proven the plaintiff has failed to make out his case against the defendant and the defendant will be entitled to a verdict at your hands.

If you find that the defendant did not commit adultery with the plaintiff's wife, but that her separation from him was due not to that cause, but to the plaintiff's own misconduct, the plaintiff is not entitled to recover. If the husband consents to the wrongdoing of his wife, or connives at her adulterous intercourse, he can not recover. But he is not to be charged with consent or connivance at the wrongdoing merely because he may have been negligent in respect to her conduct and thus permitted opportunities for wrongdoing on her part where he had no suspicion of her infidelity. The mere fact that the plaintiff may have had knowledge that his wife was at times in the company of the defendant will not defeat his right to recover if he had no suspicion of wrongdoing between the defendant and his wife. Nor will the licentious conduct of the plaintiff, if you find he was guilty of such misconduct, amount to a consent that she might conduct herself in the same way, but such misconduct on his part is a material matter to be considered, as I have already said, upon the amount of damages to be allowed, if you find the plaintiff is entitled to recover damages. The fact that another branch of this court may have decided that the charge of adultery made against the wife of the plaintiff was not sustained, does not bar the plaintiff's right of action, nor is it competent evidence for the defendant in this case. You must

determine that question upon the evidence before you, uninfluenced by the finding of the court in the divorce case. But it is competent for you to consider, as I have said, the evidence tending to show misconduct on the part of the plaintiff in his marital relations.

3. *Damages.* If you find that the plaintiff is entitled to recover damages, the amount to be allowed rests in your sound judgment and discretion. In such cases as this, there is not and can not be from the nature of the case any fixed rule by which to measure compensation to the injured party. In estimating the damages, you should take into consideration the nature of the injury which consists in the dishonor of his marriage bed. If the defendant committed adultery with the plaintiff's wife, the plaintiff will be entitled to recover damages on account of the mental anguish suffered and the wound to his feelings and pride, resulting from the wrongful conduct of the defendant. And if this resulted in the loss to him of the comfort and society and aid of his wife in his domestic affairs, this should also be considered by you in estimating the damages.

In such a case as this the jury have a right to give what is called punitive or exemplary damages. That is, damages by way of punishment of the defendant for his conduct and which may be an example to deter others from the commission of like offenses. The damages should not be, however, excessive, that is, they should not be so great as to be beyond all reasonable measure of such damages, but in no case can you allow more than the plaintiff has asked in his petition.

If you find that the plaintiff has failed to prove by a preponderance of the evidence that the defendant committed adultery with his wife, then that will be an end of the case, and your verdict should be for the defendant.¹

¹ *Polzer v. Lang*, Com. Pleas Court, Franklin Co., O., Bigger, J.

Sec. 1485. Alienation of Affections.

1. *Limitation of action for—Admission of acts prior to.*
2. *Husband voluntarily bestowing affections on another—
Must be wrongful act of defendant.*

3. *Relationship of husband and wife prior to act.*
4. *Malice.*
5. *Abandonment of husband not prerequisite of suit by wife.*
6. *Measure of damages.*

1. *Limitation of action for—Admission of acts prior to.* As you will observe, the defendant pleads the statute of limitations. Under the statute the right of the plaintiff to recover for the alleged wrongful actions of the defendant is limited to a period of four years prior to the commencement of this suit; that is, it is only for those wrongful acts on the part of the defendant, if such are proven, which occurred within a period of four years prior to the commencement of this action and their effects upon plaintiff's husband in alienating his love and affection from the plaintiff that can be made the basis of recovery of damages in this case.

To entitle plaintiff to recover, it must appear from the evidence that the wrongful acts of the defendant occurring within the four years, if such are proven, did result in alienating the love and affection of the plaintiff's husband to some extent. It is not sufficient merely to prove that within that time his love and affection for the plaintiff have been alienated. But it must also be proven by a preponderance of the evidence that there was a direct malicious interference on the part of the defendant sufficient to cause alienation of his love and affection to some extent at least, or to restrain that love and affection from his wife, and the plaintiff has the burden of proving this interference.

It is not essential to a recovery on the part of the plaintiff that you should find that she had proven all of the statements contained in her amended petition of wrongful acts, inducements and blandishments on the part of the defendant, but it must be proven that she maliciously interfered between the plaintiff and her husband, and that this interference resulted in the alienation of his love and affection to some extent or in restraining the bestowal of that love and affection upon his wife.

Proof has been admitted tending to show that the defendant had begun interference between the plaintiff and her husband prior to four years before the bringing of the suit. This testimony was admitted only for the purpose of tending to show what the disposition of the defendant was toward the plaintiff's husband during the period of four years prior to the commencement of the suit.

You can not make any such wrongful acts on the part of the defendant, prior to four years before the commencement of this suit, a ground of recovery here, because such acts on her part, if any such are proven, are barred by the statute of limitations which is pleaded.

2. *Husband voluntarily bestowing affections on another—Must be wrongful act of defendant.* A wife is entitled to her husband's conjugal affection and society, and if you find that the plaintiff in this case has been, by the wrongful acts of the defendant, deprived of that right, this will give rise to a cause of action on her part against the defendant and entitle her to recover damages under the rules above stated.

If the husband voluntarily bestowed his affections upon the defendant, without any wrongful acts or solicitations or blandishments on the part of the defendant, the plaintiff will have no right to recover damages, and if you find such to be the fact, your verdict should be for the defendant. Furthermore, if you find the affections of the plaintiff's husband were entirely and absolutely alienated from the plaintiff by the defendant's wrongful conduct, prior to four years before the bringing of this suit, the plaintiff can not recover, by reason of the bar of the statute of limitations, unless you find that his love and affection was withheld from her during that period by reason of the blandishments and seductions of the defendant.

The right of the plaintiff to recover damages must be confined to the wrongful acts of the defendant, if any such are proven, committed within the period of four years before the bringing of this action, and, of course, if you find that such acts on the part of the defendant within that period did not

result in alienating the affections of plaintiff's husband, there can not be any recovery, although you might find she had been guilty of such wrongful conduct before that time which resulted in alienating the affections of plaintiff's husband. But if you should find the fact to be that the affections of plaintiff's husband were not entirely or absolutely alienated from the plaintiff prior to four years before the bringing of this suit, but that by reason of the wrongful conduct of the defendant set out in the petition, which occurred within the period of four years, his affections have been alienated or kept from the plaintiff during said period of four years, then to the extent that you may find her wrongful conduct has resulted in alienating his affections from her or in restraining them from her, she will be entitled to recover damages.

3. *Relationship of husband and wife prior to act.* There has been some evidence as to the relationship existing between the plaintiff and her husband prior to the wrongful acts complained of. It is your duty to consider the evidence upon that subject, if you find that the plaintiff is entitled to recover, upon the question of the amount of damages to be recovered, for the reason that the greater the love and affection of the husband for his wife, the greater is the damage suffered by her when that love and affection is alienated.

4. *Malice.* Hatred, ill will or actual malice towards the injured party is not a necessary ingredient of legal malice as applied to torts, nor is it necessary that the act complained of proceed from a spiteful, malignant or revengeful disposition. If it be wrongful, unlawful and intentional and the natural and probable result of the act is to accomplish the injury complained of, malice is implied.

5. *Abandonment of husband, not prerequisite of suit by wife.* It is not a prerequisite to the right of the plaintiff to maintain this suit in her own name that she should have been abandoned by her husband in the literal sense, nor that she should have actually separated herself from him by or without a decree of divorce. If she has suffered the wrong complained of, her right

to redress is absolute; it can not be made to depend upon any of these conditions, as long as she keeps her marriage contract, so long she has the right to the conjugal society and affections of her husband. Possibly she may regain these. This possibility is her valuable right. The defendant may not demand that she shall sacrifice it for the future as the price of redress for injuries in the past.

6. *Measure of damages.* The measure of damages in alienation of the affections of a husband includes compensation for the loss of affection, society and companionship of the husband, compensation for mental suffering and distress of mind of the wife. The amount of such damages must rest in the sound judgment and discretion of the jury, as no exact rule can be stated by which such damages can be measured. It must be a reasonable amount in view of all the circumstances of the case.¹

¹ *Baird v. Willis*, Common Pleas Court, Franklin Co., O., Bigger, J.

Sec. 1486. Claim of mistreatment of wife by husband.

It is claimed by the defendant that he has produced evidence tending to show that the plaintiff drove his wife away from him on account of his cruel treatment of her. This evidence, gentlemen, if true, is not a defense in the action, provided that you find that the defendant did alienate the affections of plaintiff's wife; but it is evidence that you should take into consideration, if you come to that question, in mitigation of any damages that you think the plaintiff has sustained. It was introduced for that purpose, and for that purpose should be considered by you, and by way of rebutting the claim of the plaintiff that his wife's affections were alienated by the defendant. It is the claim of the defendant that this plaintiff drove his wife away on account of his cruel acts towards her; drove her from his house and home, and that this was the reason and on that account she left, and not by reason of any acts or conduct of his that caused her to separate from him.¹

¹ *Cottle v. Kellogg*, Trumbull County C. P., Gillmer, J. The bad character of the husband will not mitigate damages, unless he is guilty of unchastity or other wrong to the wife. *Norton v. Warner*, 9 Conn. 172.

Sec. 1487. Connivance of or encouragement by plaintiff of alienations—Or his own misconduct bars recovery.

If the jury finds that plaintiff permitted or connived at or consented to or encouraged such alienations and conduct from the defendant to his wife or from his wife to the defendant, then your verdict must be for the defendant, notwithstanding you may believe from the evidence that such attentions and conduct finally resulted in alienating the affections of the plaintiff's wife from him and in her separation from him.

If she had any affection for plaintiff and the same was alienated by the conduct and actions of plaintiff himself towards her, or by his neglect of her, or from any cause whatever other than the intentions, conduct or influence of defendant, with the wrongful and willful purpose and intent of alienating her affections from her husband, or inducing her to separate or remain away from him, then your verdict will be for the defendant.¹

¹ Fuller v. Robinson, 230 Mo. 22; 130 S. W. 343; Am. Ann. Cas. 1912 A. 938 and note.

Sec. 1488. Preponderance of evidence only, essential.

The jury are instructed that in cases of this kind, where an illegal act is charged or involved in the civil suit, the same rules of evidence generally applicable in civil suits prevail, as against those which should be followed if you were investigating the criminal charge involved in a criminal case. Adultery is made a crime by our laws, and if you were trying that issue under an indictment, you would be required to find the defendant guilty thereof beyond a reasonable doubt. Not so in a civil proceeding as here, where it is charged, as in this case, that the defendant has committed adultery with the wife of the plaintiff, you are not required to be satisfied for the purposes of this suit beyond a reasonable doubt, that the defendant has been guilty of adultery with the wife of the plaintiff, that you are only to look to all the evidence, and if you find by a preponderance of the evi-

dence that the defendant committed adultery with plaintiff's wife, then upon that point, as one of the facts in this case, you may find for the plaintiff.¹

¹ There certainly can be no doubt but that the rule that the doctrine of reasonable doubt of criminal cases does not apply to civil issues. The great weight of authority and the better view is that in civil issues the result should follow the preponderance of evidence, even though the result imputes the crime. This rule has been adopted in Ohio. *Lyon v. Fleahmann*, 34 O. S. 151; *Shaul v. Norman*, 34 O. S. 157; *Jones v. Greaves*, 26 O. S. 2. This is at least the case in all cases aside from those enormous crimes, *Id.* See fully opinion in 34 O. S. 151-156, and authorities cited. It is treated very fully in Wharton's Ev. Sec. 1246; 1 Greenleaf's Ev. Sec. 13*a*, note.

Sec. 1489. Burden and character of proof of adultery.

Now, gentlemen, you have listened to the evidence in this case patiently, and the question as to whether the defendant has had sexual intercourse with the plaintiff's wife at any time is for your determination, after due consideration of all the facts and circumstances of this case, as shown by the evidence. The burden is upon the plaintiff to prove said acts by a preponderance of the evidence. If he has failed to establish that fact by the weight of the evidence, then your decision on that point should be against the plaintiff. It is not claimed on the part of plaintiff that he has produced any witness who has testified to seeing any act of adultery between the defendant and plaintiff's wife, but the plaintiff claims that he has shown such facts and circumstances as will warrant the conclusion that adultery was committed. The burden is upon the plaintiff to show such a state of facts as will satisfy you of their truth by a preponderance of the evidence.¹

¹ Nye, J., in *Wagner v. Shaw*, Medina Co. Com. Pl.

Sec. 1490. Measure of damages.

If, under these instructions, however, you find the issues joined for the plaintiff, then your next inquiry will be as to the measure of damages this plaintiff has sustained on account of the wrongful acts of this defendant, alleged in his petition, by

which he lost the affection and confidence of his wife. This will include not only the loss of the wife's affections, but for the comfort of the wife's society. If you shall find that the defendant seduced the plaintiff's wife, then you should include also dishonor of the marriage bed; the mortification and sense of shame produced to the husband through the knowledge and results of such seduction, and also loss of the wife's services if she separated from her husband through such seduction.

It is difficult to lay down any precise rule for you to ascertain or measure the amount of compensation or damages that the plaintiff would be entitled to, provided that you find for the plaintiff.

The jury should, however, exercise their own judgment and common sense in determining what amount of damages, if any, would be a fair compensation to the plaintiff for whatever injury they may find from the evidence he has suffered on account of the wrongful acts alleged and averred in his petition.¹

¹ Gillmer, J., in *Cottle v. Kellogg*; *Matheis v. Mazet*, 164 Pa. St. 580.

CHAPTER LXX.

ANIMALS.

SEC.

1491. Owner of domestic animal not liable for injury when it is rightfully where it may be, unless it is vicious—Rule otherwise when animal breaks close of another.

1492. Liability of owner of domestic animal trespassing on lands of another.

1493. Ferocious dog at large—Knowledge of its character—What constitutes keeping of.

1494. Scienter—Proof of.

1495. Defense that dog fastened on premises.

SEC.

1496. Liability of trespasser leaving gateway so horses escape into another field, where injury done in fight with strange horses.

1. Statement of claim.

2. Temporary possession sufficient to claim of trespass.

3. Disposition of animal.

4. Fighting, proximate cause of wrongful trespass and injury.

5. Jury to consider probabilities.

6. Proximate cause.

Sec. 1491. Owner of domestic animal not liable for injury when it is rightfully where it may be, unless it is vicious—Rule otherwise when animal breaks close of another.

It is a rule of law that the owner of a domestic animal is not in general liable for an injury committed by such animal while in a place where it rightfully may be, unless it is shown that the animal was vicious in the particular complained of, and that the owner had notice of such vicious propensity.

And where an animal breaks into the close of another and there damages the real or personal property of one in possession, the owner of the trespassing animal is liable without reference to whether such animal was vicious, and without reference to whether such vicious propensity was known to the owner, for the law holds a man answerable not only for his own trespass, but for that of his domestic animal. The natural and well-known

propensity of horses is to rove, and the owner is bound to confine them on his own land, so that if they escape and do mischief of the land of another, under the circumstances where the other is not at fault the owner ought to be liable.¹

¹ *Morgan v. Hudnell*, 52 O. S. 552; *Dolph v. Ferris*, 7 Watts & Serg. 367.

Sec. 1492. Liability of owner of domestic animal trespassing on lands of another.

If the defendant's horse was at the time trespassing in plaintiff's field, on plaintiff's land, or on the land of a third party where plaintiff was pasturing his horse by the month, for a consideration paid by plaintiff to such owner, and there attacked and killed plaintiff's horse, defendant is liable for the injury, whether he knew or did not know of the vicious propensity of his horse.

If the jury find that the defendant's horse was in pasture on his wife's premises, and while there broke over part of the partition fence, separating her said lands from the field in which plaintiff's horse was being rightfully pastured by him, then the defendant's horse was unlawfully in the place where the plaintiff's horse was on pasture, and in such case, if the jury find that he killed plaintiff's horse, the defendant is liable to plaintiff for the injury, whether his horse was in fact vicious or not, and whether he knew of such viciousness or not.¹

¹ *Morgan v. Hudnell*, 52 O. S. 552.

Sec. 1493. Ferocious dog at large—Knowledge of its character—What constitutes keeping of.

"A ferocious dog, known to the keeper to be accustomed to bite mankind, is to be regarded as at large, within the common import of those terms, when he is so free from restraint as to be liable to do mischief to man, and this, such a dog is always liable to do when not physically restrained. You will, therefore, determine from the evidence whether or not the defendant properly restrained the dog in question as the keeper of a vicious and ferocious dog is bound to keep it from doing injury at his peril."

If you find from the evidence that the dog in question was vicious and ferocious, and known as such to the defendant, and you further find that the defendant was the head of her family, having possession and control of a house or premises, and she suffered or permitted the dog to be kept on her said premises, in the way such domestic animals are usually kept—as a member of the family, so to speak (in so far as a house dog may be termed a member of one's family)—such head of a family, the defendant herein, is to be regarded the keeper and harbinger of such dog, and it makes no difference whether the defendant was the owner of the dog or not.”¹

¹ Request given in *O'Farrell v. Alberty*, Lucas County. Affirmed by Circuit Court; settled and dismissed in Supreme Court.

One who knowingly and wrongfully suffers a ferocious dog to go freely about his premises where he is also fed and housed is liable for injuries done by such dog, regardless of the question of ownership. *Frammel v. Little*, 16 Ind. 251; 1 *Cummings v. Riley*, 52 N. H. 368; *Marsh v. Jones*, 21 Vt. 378; *Meibus v. Dodge*, 38 Wis. 300; *Barrett v. Madden & M. R. R. Co.*, 3 Allen (Mass.) 101; 3 *Loomis v. Terry*, 17 Wend. 496. See *Nordeck v. Loeffler*, 2 W. L. B. 258.

Ownership is sometimes implied by mere possession, and so, likewise, it is presumed that the owner of the dog is the person who keeps or harbors it. And the ownership may be shown as a circumstance indicative of the keeping of the animal. 2 Sh. & Red. on Neg. Part 7:—Chap. XXX, § 626—636; *Buddington v. Shearer*, 20 Pick. 477; *Grant v. Ricker*, 74 Maine 487; *Dickson v. McCoy*, 39 N. Y. 400; *Sullivan v. Scripture*, 3 Allen (Mass.) 564; *Smith v. Jacques*, 6 Conn. 580; *Oakes v. Spaulding*, 40 Verm. 347.

Sec. 1494. Scienter—Proof of.

“To enable the plaintiff to recover he must prove that the dog was accustomed to bite mankind, and that it must also be proved that the defendant had knowledge that he was so accustomed to bite; that if a single instance of biting mankind previous to the act complained of in the declaration was fully and satisfactorily proved to the jury and a knowledge of such act on the part of the defendant was proved in like manner, that had been held sufficient to warrant a jury in finding a verdict for the plaintiff in cases of this kind; but that the force of such testimony would depend much upon the circumstances attending the transaction,

as, whether they indicated a disposition to bite without provocation, or the contrary.”¹

¹ *Arnold v. Norton*, 25 Conn. 92. Thompson on Trials, Sec. 1493. The Statute in Ohio which abrogated the common-law rule (13 O. S. 485) has since been repealed.

Sec. 1495. Defense that dog fastened on premises.

The defendant may show in her defense that this dog was properly secured there upon the premises, was secured so that he could not come at anyone to commit any damage, and in that connection you must consider the relations existing between plaintiff and defendant on the premises of the former of the plaintiff there to the defendant and her premises: If the plaintiff was there at work on the premises with Mrs. O.'s knowledge and consent, then he would have a right to go about the premises in a reasonable way, to carry out and dispatch the business that he was employed to do; and if, in going about in that way, he was bitten by a dog, then he would have a right to recover; though, if you find that the dog was properly secured, was kept there securely shut up by the defendant, or with her knowledge, knowing that it was so kept so that he could not come at anybody, and if A., the plaintiff, was told not to go there, and he understood that the dog was there, and knew that it was dangerous to go there—knew why he was forbidden to go there and understood it—then, if he went where the dog was securely shut up and kept safely—knowing that he was dangerous—if that is shown and made out by the evidence—by a preponderance of evidence—then the plaintiff can not recover.¹

¹ *O'Farrell v. Alberty*, S. C. No. 3,291, Lucas County, Harmon, J.

Sec. 1496. Liability of trespasser leaving gateway so horses escape into another field, where injury done in fighting with strange horses.

1. *Statement of claim.*
2. *Temporary possession sufficient to claim of trespass.*
3. *Disposition of animal.*

4. *Fighting, proximate cause of wrongful trespass and injury.*
5. *Jury to consider probabilities.*
6. *Proximate cause.*

1. *Statement of claim.* The pleadings present the question whether the plaintiff is entitled to recover from the defendant, R., the value of a horse owned by him and claimed to have been injured by the wrongful act of the defendant. That wrongful act consists of a charge of wrongful trespass upon lands in which the plaintiff claims some interest by way of the right of possession as a pasture field.

The plaintiff alleges that his horse was reasonably worth \$—— at the time of the injury by the alleged wrongful act of the defendant. The defendant denies the commission of a wrongful act by him.

The evidence without dispute shows that the plaintiff had rented the S. field, so-called, from A. H. S. for pasture. The undisputed evidence also shows that the gateway in question was so constructed as that it could not be opened without tearing it apart or removing one of the boards; that it was so constructed that it could not be loosened from the west post without that board being taken out; so that stock confined in the S. field could not in any wise remove that gate. The undisputed facts are that R. drove the wagon loaded with hay through the gateway between the field in possession of the plaintiff in which his two horses were at the time, and the B. field. The plaintiff testified that he did not give permission to R. to go through that field, and that he did not have any knowledge that he did go through the field until after the act was committed.

2. *Temporary possession sufficient to claim of trespass.* The court states to the jury as matter of law that under the testimony in this case the plaintiff, P., had such a temporary right of possession to that field, and especially to the benefits to be derived from the fence and the gateway for the protection of his stock being grazed therein, as to entitle him to complain of the wrongful act of trespassing upon that property, which the

court states as matter of law constitutes a wrong and a trespass upon the rights of the plaintiff P. So that in view of this instruction to the jury you will disregard all arguments and claims of counsel reflecting upon that point which are not consistent with the statement made by the court. The court states to you that as a matter of law and fact the defendant, R., was guilty of committing a wrongful act in going through this gateway, which was a trespass upon the temporary right of possession which existed in the plaintiff, P.

The claim of plaintiff is that the injury to his horse was caused by the act of R. in driving through the gateway and by leaving the same open so that the horse of plaintiff passed into and upon the B. field, and that the bay horse of B. kicked the horse of plaintiff, which made it necessary to kill it.

There is no evidence, gentlemen, in this case that brings it within the rule of law applicable to vicious animals; and any liability of the defendant, R., must rest not upon that ground, but upon other grounds. And you will, therefore, pay no attention to the question of what is termed in law a vicious animal.

3. *Disposition of animal.* Evidence has been admitted, however, for your consideration as to the disposition and character of the horses in question. That you may consider, for whatever you deem it worth in deciding the questions of fact submitted to you. But it has no relation to the liability of one who owns a vicious horse and who has knowledge thereof for any injury to another by such horse.

4. *Injury to horse by fighting proximate cause of wrongful trespass.* The jury is instructed that if the injury to the horse of plaintiff was directly and proximately caused by the wrongful act of the defendant in passing through the gateway of plaintiff without right, and wrongfully, he may be held liable therefor. Even though the defendant did undertake to erect a temporary barrier in the gateway after upsetting the load of hay and breaking the gate post, if the jury find that he did erect the same; and even though he used reasonable and ordinary care in such act, and though he believed that he had made reasonable

provision to keep the horses from passing from one field to the other, still if the horses were attracted to the place by the hay which was upset at such point, and the temporary barrier so erected was insufficient to keep the horses from passing through to the other field, notwithstanding such barrier, and if the horse of plaintiff did pass into the field of B. because of the wrongful act and trespass of R. and mingle with the horses of B. and was injured by reason of fighting with the horse of B., and because of such fighting, whether by being kicked by B.'s horse or by the other horse of the plaintiff, the defendant, R., may be held responsible for such injury if the jury find that such fighting and such injury was the direct and proximate cause of such wrongful trespass by R. upon the temporary possession of the property of the plaintiff.

If the jury find that the fighting between the horses of plaintiff would not have occurred or would not have taken place but for their entry into the field of B. and because of their mingling with or coming in contact with the horse of B. in his field, then the jury may find the defendant liable for the injury to plaintiff's horse. Or if the jury find that defendant did not erect the temporary barrier as claimed by him, and the horses of plaintiff passed into the field of B. and became engaged in a fight with the horse of B., and plaintiff's horse was injured, which would not have happened but for the wrongful act of R., the latter will be liable if such injury resulted as the proximate cause of the wrongful act and trespass which the court states to you was committed by the defendant, R.

5. *Jury may consider probabilities.* It is not required that the jury shall be absolutely convinced of the existence of the essential facts to fix the responsibility of the defendant. On the contrary, the law permits you to deal in probabilities, or to decide the facts as you may find them to have probably been. And the evidence in this case does not consist alone in the mere statements of witnesses. Nor do you have to believe such statements merely because they are made by a witness or any witness, if you deem it proper to disbelieve the same. But you may draw

such inferences from facts and conditions which you may find to be probably established by the evidence and apply the legal consequences attaching thereto according to the rule of liability contained in the instructions as to the law given you by the court. You may consider the probability of the horses passing over and through the alleged temporary barrier; whether the gate would have been probably broken by the horses passing through the same, or whether, looking to the inferences from facts and alleged claims made in evidence, or other claims made in evidence as to the location of the rake and the fence boards, the alleged temporary barrier was or was not erected. The facts are entirely for the jury to decide.

6. *The proximate cause.* The proximate cause of an injury is the direct or efficient cause of the wrong done, the act which if it had not been committed, the injury would not have been done. The jury will make its deductions from the evidence and find the ultimate facts or fact therefrom and apply the rule of liability contained in the charge of the court and affix the legal consequences applicable thereto by your verdict.¹

¹ Pendleton v. Ross, Franklin Co. Com. Pl., Kinkead, J.

CHAPTER LXXI.

ASSAULT AND BATTERY.

SEC.

- 1497. Assault and battery defined.
- 1498. Assault by teacher on pupil.
- 1499. Assault and battery by railroad employee — Flagman.
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 - 2. Burden of proof and credibility of witnesses (omitted).
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- 8. Direction as to verdict for plaintiff.
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- 10. When verdict may be for defendant.
- 1500. When committed in self-defense.
- 1501. Force used in repelling assault, not nicely measured.
- 1502. Defense of self and child—Force used.
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- 1504. One provoking assault may recover if he afterwards withdrew.
- 1505. Damages recoverable in civil action.
- 1506. Effect of conviction in criminal prosecution on civil damages.

Sec. 1497. Assault and battery defined.

Any unlawful beating or other wrongful physical violence or constraint inflicted on a human being, without his consent, is an assault and battery.

If a person only so much as lay his finger upon another, without his consent, in a rude, angry, insulting or indecent manner, he commits an assault and battery.

But gently touching or laying the hand upon another in a friendly way, without any harmful or evil intent, is not an assault and battery.

If two neighbors meet and shake hands, no assault and battery is committed.

If one friend steps up and lays his hand gently on the shoulder of another, with the intention of speaking with him or for some other proper purpose, no offense would be committed, but such an act as this might be an offense, even though done without any feeling of anger. If instead of laying the hand gently on the shoulder, a great degree of violence were used, so as to cause physical pain, the rudeness of the act might render the party doing it liable either civilly or criminally for assault and battery.¹

¹ Hawes, J., in *Harper v. Hart*, S. C. 1500. Assault defined in *Fox v. State*, 34 O. S. 377.

Sec. 1498. Assault by teacher on pupil.

1. *Right to correct pupil, extent thereof.* The defendant claims that in correcting C., a pupil, he took hold of him, and administered such corporal punishment as was necessary for the proper government of the school, and that he had a right to administer said punishment, and in doing what he did he committed no assault and battery and no offense whatever.

You are instructed that a school teacher has a right to give moderate corporal correction to his pupils for disobedience to his lawful commands, negligence, or for insolent conduct.¹

It is not an assault and battery for a teacher to correct and punish a pupil in a reasonable way. But if the punishment be extreme, unreasonable or cruel, or such as would naturally occasion permanent injury to the pupil, or if inflicted merely to gratify an evil passion, the teacher would not be justified, and would be guilty of assault and battery.²

The right of a school teacher to correct his scholars has been practically and judiciously sanctioned, but the punishment must not exceed the limits of moderate correction. A teacher, in the exercise of the power of corporal punishment, may not make such power a pretext of cruelty or oppression, but the cause must be sufficient, the instrument suitable, and the manner and

extent of correction, the part of the person to which it is applied, and the temper in which it is inflicted should be distinguished with the kindness, prudence and propriety which become the station of the teacher. The jury will consider and determine whether the defendant was justified in administering or inflicting any punishment upon C.; whether what was inflicted was reasonable and proportionate to the offense of the pupil, or appropriate in its kind and character, such as a teacher had a right to inflict.

If you find that the conduct of the pupil was such as to deserve and merit punishment, then as a matter of law the defendant was justified in inflicting such punishment as the particular circumstances of that case reasonably required and deserved.

If you find that the conduct of the pupil was such as not to merit or deserve punishment, then as a matter of law the defendant was not justified in inflicting any punishment whatever upon him. The defendant would not be justified in inflicting corporal punishment upon the person of C. without any just cause, nor unless it was done for the purpose of correcting or disciplining for a violation of the defendant's lawful and reasonable commands as such teacher.

The defendant would not be justified in inflicting corporal punishment upon the pupil for the purpose of gratifying the defendant's passion or malice; if it was done for the mere purpose of gratifying the passion or malice of the defendant and without just cause, then any punishment inflicted for that purpose would be unlawful and constitute an assault and battery.

If the conduct of the pupil was such as to deserve and merit punishment, it was the duty of defendant to do it in a reasonable and moderate manner, and to use only such means as were reasonable and proportionate to the offense committed by the pupil.

But if you find from the evidence that there was a just cause for the punishment, and that the defendant used extreme, unreasonable and cruel punishment, he would be guilty for the

excessive punishment so used. And if the excessive punishment was unreasonable and grossly disproportionate, such excess would constitute an assault and battery.

If you find from the evidence that the conduct of the pupil was such as to justify the defendant in punishing him, it was the duty of the defendant to use a suitable and proper instrument, and administer punishment in a reasonable and proper manner, and if the defendant punished the pupil in an unreasonable and improper manner, by reason of a sudden and violent passion through malice, such punishment would not only be unjustifiable, but unlawful.

If you find that he was not justified in administering any punishment, and you further find that the defendant unlawfully struck, beat, wounded, or ill treated the pupil, then you should so determine by your verdict.

But if you find from the evidence that the conduct of the pupil was such as to merit and deserve some punishment, it will be necessary for you to go further and determine from the evidence whether the punishment administered was reasonable and commensurate with the offense committed. If you find it was, then the defendant would not be guilty.³

¹ Reeves Dom. Rel. 534; 1 Bishop's Cr. Law, sec. 886.

² Field's L. B., Sec. 267: *Boyd v. State*, 16 Am. St. 31; 1 Bishop's Cr. Law sec. 886.

³ Nye, J., in *State v. Joseph Seaton*, Medina Co. Com. Pleas; 1 Bishop's Cr. Law, sec. 886.

Sec. 1499. Assault and battery by railroad employee or flagman.

1. *Statement of claim.*
2. *Burden of proof and credibility of witnesses (omitted).*
3. *Assault and battery defined.*
4. *Relative rights and duties of pedestrians and railway company at railroad crossing.*
5. *Same—Right and duty of flagman and responsibility of railway for his acts.*
6. *Assault and battery may be negligently committed.*

7. *Proximate cause.*
8. *Direction as to verdict for plaintiff.*
9. *Measure of damages.*
10. *When verdict may be for defendant.*

1. *Statement of claims.* The plaintiff brings this action against the railway company for an alleged assault and battery claimed to have been committed by the servant of the defendant who was at the time in question acting as flagman. It is charged that the flagman, while engaged in his duties and in the line of his employment, with force and violence maliciously, recklessly and without cause or provocation, assaulted plaintiff, etc.

The defendant enters a general denial.

3. *Assault and battery defined and explained.* The charge contained in the petition is assault and battery. An assault and battery is either an unlawful, intentional and willful injury to the person of another, or it is a willful, wanton, careless or negligent commission of an act of violence to the person of another, which is the proximate cause of the injury.¹

4. *Relative rights and duties of pedestrians and railway company at railroad crossing.* Plaintiff had the right to cross over the railway tracks of the defendant at the crossing in question; but it was his duty to refrain from passing over the tracks when trains or engines of the railway company were approaching such crossing; and it was also his duty to give heed to any signal or warning which may have been given him by the flagman of the defendant, if any the jury find were given.

At the time when a railway train and a foot passenger or pedestrian are about to cross a railroad crossing, the railway company has the superior right of way. The railway company had the right, and it was its duty to give signals or warnings to pedestrians and to this plaintiff, who were about to cross over its tracks, and it was the duty at this time when the plaintiff was about to cross over the track of the railway company to give signals and warnings of the danger from approaching trains or engines, which, as already stated, should be observed by the plaintiff.

5. *Same—Right and duty of flagman and responsibility of railway for his acts.* It is the law also, gentlemen, that the flagman or servant may use such reasonable means and force as may be reasonably necessary under the circumstances to warn and prevent persons—and such was the right and duty of the flagman as to the plaintiff—from crossing over the tracks of the defendant company at the time of approaching engines and trains at such crossings, to prevent injury to them, or to this plaintiff, therefrom; and there can be no liability for injury on the part of the railway company unless more force than was reasonably necessary was used in giving the warning or in preventing persons from crossing the track at the time of the approaching train.

The railway company is responsible for any injury caused to any person by such flagman, and would be in this case responsible to the plaintiff, if the servant uses more force than was reasonably necessary, considering all the circumstances at the time, to warn and keep persons from approaching such crossing.

6. *Assault and battery may be negligently committed.* An assault and battery, as before stated, may be intentional, that is, it may be intentionally or willfully committed, or it may be the result of negligence.² That is, if the flagman of the defendant failed to observe ordinary care in the performance of his duties in warning and keeping persons from the tracks, such care as persons engaged in that kind of work ordinarily exercise under similar circumstances. If he was guilty of culpable negligence in handling the flag staff, which was the proximate cause of the injury, the defendant would be liable in such case; that is the question for the jury to determine.³

7. *Proximate cause.* Proximate cause is the immediate, efficient cause, the act which caused the injury to the plaintiff, the act which without the intervention of any other unforeseen cause produces the injury. This doctrine, gentlemen, is to be considered by you only in the event that you conclude that the act of the flagman was not intentional and willful. The jury in such case will determine whether it was the conduct of plaintiff or of the flagman which caused the injury.

8. *Direction as to verdict for plaintiff.* If the jury find that A., defendant's servant, while in the line of duty, intentionally and willfully struck the plaintiff, or that he used more force than was reasonably necessary under the circumstances to protect plaintiff from death or great bodily injury from approaching trains, and injured him, your verdict in such case should be for the plaintiff.

9. *Measure of damages.* If you should find in favor of the plaintiff, you should award him such compensation by way of damages as you in your judgment deem proper, considering the nature of the injury, his pain and suffering, if any. If the jury should find that the flagman was actuated by malice, then it may go beyond the rule of mere compensation and award exemplary or punitive damages; and in such case you may in your estimate of punitive damages take into consideration and include reasonable fees of counsel employed to prosecute the action. Exemplary or punitive damages are assessed in cases only where the act is maliciously done; not to punish, but merely as an example. Malice is not necessarily ill will toward a person, but is indicative of an intentional or willful disregard of the rights of another.

10. *When verdict may be for defendant.* If, however, the jury should find that the injury was not intentionally and willfully committed by defendant's servant, but on the other hand, that he used only such force or adopted only such means in the performance of his duties as was reasonably calculated and necessary under all the circumstances appearing in the evidence to protect plaintiff from injury, and that the injury was not the result of carelessness or negligence on the part of the flagman, and you find that it was proximately caused by the conduct of plaintiff himself in disregarding warnings and other reasonable means adopted by the flagman to protect plaintiff from injury in crossing the tracks from approaching trains, then your verdict should be for the defendant and against the plaintiff.⁴

¹ Fishwick v. State, 10 N. P. (N.S.) 110; 21 L. D. 127.

² State v. Mueller, 6 O. L. R. 542, 545; 54 Bull. 94.

³ *Mercer v. Corbin*, 117 Ind. 450; *Com. v. Adams*, 114 Mass. 323; *Fishwick v. State*, 10 N. P. (N.S.) 110.

⁴ ——— *v. C., C. C. & St. L. Ry., Franklin Co. Com. Pl., Kinkead, J.*

Sec. 1500. When committed in self-defense.

If you find from the evidence that the defendant committed an assault and battery upon the plaintiff, without any just cause or provocation, the defendant would be liable in this action.

The act of assault and battery may be justified by evidence that it was done in self-defense. One man may protect his person from assault and injury by opposing force to force. Nor is he obliged to wait until he is struck; for, if the weapon be lifted in order to strike, or the danger of any other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow and disarming his assailant. But the opposing force or measure of defense must not be unreasonably disproportionate to the exigency of the case, for it is not every assault that will justify every battery. If the violence used was greater than was necessary to repel the assault, the party is himself guilty.

If you find from the evidence that the plaintiff made the first assault upon the defendant with his cane, the defendant would have a legal right to resist such assault with such force as was necessary to protect himself from the assault of the plaintiff. If you find from the evidence that the plaintiff, without any just cause or provocation, ran towards the defendant and struck him with his cane, and afterwards raised his cane to strike him again, and that the defendant believed and had reasonable grounds to believe that he was in imminent danger of great bodily harm, the defendant would be justified in using such force as he had reasonable ground to think was necessary to protect him from said danger, and if he only used such force, he would not be liable in this action. But if you find from the evidence that the plaintiff did make the first assault upon the defendant, the defendant would not be justified in using any more force to resist said assault than he believed, and had reasonable grounds to believe, was necessary to protect him from the assault of the plaintiff. And if you find that the defendant did use more

force than he believed, and had reasonable grounds to believe, was necessary to protect himself from the assault of the plaintiff, the plaintiff would be liable for said excessive force and no more.

Now, gentlemen, if you find for the plaintiff under the evidence and instructions given you by the court, it will be your duty to assess such damages to which you find the plaintiff is entitled.¹

¹ Voris, J., in *Pford v. Pixley*, Summit County Common Pleas. See *Stewart v. State*, 1 O. S. 66; 1 Bishop's Cr. Law, sec. 865; *State v. Burke*, 30 Ia. 331. Right to repel attack. *State v. Hilbrant*, 7 O. L. R. 440. It is erroneous to state that the burden is on defendant to show he was in actual danger, that the exigency demanded self-defense, and that he used no more than was actually necessary, because it ignores the question of reasonable belief of danger. *Aurand v. State*, 12 C. C. (N.S.) 311.

Sec. 1501. Force used in repelling assault, not nicely measured.

The law does not measure nicely the degree of force which may be employed by a person attacked, and if he uses more force than is necessary, he is not responsible for it unless it is so disproportionate to his apparent danger as to show wantonness, revenge or a malicious purpose to injure the assailant.¹

¹ Voris, J., in *Pford v. Pixley*, Summit County Com. Pleas. 1 O. S. 66.

Sec. 1502. Defense of self and child—Force used.

A man may protect his person and that of his child by opposing force to force, nor is he obliged to wait until he is struck, or if the weapon be lifted in order to strike, or if the danger of any other personal violence be imminent, the party in such imminent danger may protect himself by striking the first blow and disarming his assailant. But here also the opposing force or means of defense must not be unreasonable or disproportionate to the exigency of the case. No more force is to be used than necessary to prevent the violence impending. Where one is assailed he may use such means as are necessary to repel the assailant, or to prevent his own material injury.¹

¹ Nye, J., in *State v. Kimball*. "It is conceded that parent and child, husband and wife, master and servant would be excused should they

even kill an assailant in the *necessary* defense of each other." etc. *Sharp v. State*, 19 Ohio, 379, 387. Brothers may protect each other if not at fault. *Smurr v. State*, 105 Ind. 125; *Waybright v. State*, 56 Ind. 122; 1 Bishop's Cr. Law, sec. 877.

Sec. 1503. How far one may go in protection of self or child.

If you find from the evidence that the defendant made the first assault upon the prosecuting witness without just cause or excuse, and shot him or shot at him, such fact may be considered by you in determining whether the defendant is guilty or not guilty, as charged in the indictment.

If you find from the evidence that the prosecuting witness made the first assault upon the defendant, or attempted to make an assault upon the defendant, and you further find that the defendant went no further than was necessary to protect himself and child from the assault or attempted assault, then the acts of the defendant would be justifiable, and he would not be guilty of the crime charged.

If you find from the evidence that the prosecuting witness made the first assault on the defendant, or attempted to make an assault upon the defendant, and you further find that the defendant went farther than was necessary, and from all the facts and circumstances of the case the defendant had a right to believe was necessary to protect himself and child, the defendant would be liable for such excessive force used.

It is left for you to say whether or not the prosecuting witness did make the first assault upon the defendant, and if he did, if the defendant went beyond what was necessary, and from all the circumstances of the case he had a right to believe was necessary to protect himself and child from such assault.¹

¹ Nye, J., in *State v. Kimball*; 1 Bishop's Cr. Law, sec. 877.

Sec. 1504. One provoking assault may recover if he afterwards withdrew.

One voluntarily provoking an assault may recover when his adversary voluntarily renews the conflict. If the plaintiff voluntarily brought upon himself the injuries complained of, it

would seem absurd to say that he should be awarded exemplary damages resulting therefrom. But, though he may have provoked the battery, if he afterward withdrew from the conflict, the defendant could not make the provocation an excuse for following him up and beating him after he had so withdrawn.

In that case, if the defendant did voluntarily renew the conflict, the plaintiff in good faith endeavoring to avoid it, and thereupon wrongfully beat and wounded the plaintiff, and he was thereby injured so that you can see that he sustained substantial damages therefrom, then the plaintiff would be entitled to recover compensatory damages, at least, for the injury so done, and if the renewal of the assault was of a character to bring the act within the provision of exemplary damages, it would not defeat the recovery of exemplary damages.

It is the law of Ohio that one who provokes a fight may recover from his antagonist for injuries inflicted by the latter when he oversteps what is reasonable under the circumstances and unnecessarily injures such person, but he can not recover for any injuries that resulted from any reasonable resistance to the attack made by the plaintiff.¹

¹ Voris, J., in *Otto v. Mills*, Summit Co. Com. Pl.

It is said by Minshall, J., in *Barholt v. Wright*, 45 O. S. 177, 181: "It is upon the mere principle of public policy that one who is the first assailant in an assault may recover of his antagonist for injuries inflicted by the latter, where he oversteps what is reasonably necessary to his defense, and unnecessarily injures the plaintiff, or that, with true want of consistency, permits each to bring an action in the case, the assaulted party for the assault first committed upon him, and the assailant for the excess of force used beyond what was necessary for self-defense." *Dole v. Erskine*, 35 N. H. 503; *Cooley on Torts*, 165; *Darling v. Williams*, 35 O. S. 63; *Gizler v. Witzel*, 82 Ill. 322. It would seem that under the code the right of each combatant to damages might have determined in a measure in the same action. *Id.* Swan's P. and P. 259, n. a.

Sec. 1505. Damages recoverable in civil action.

If you find from the evidence that the defendant is liable in this case, the plaintiff is entitled to recover such damages as compensation as you shall find that he has sustained. And in

determining said compensation you may consider the plaintiff's injuries which he has shown were inflicted by the defendant, if any. You may consider the mental and physical pain and suffering which the plaintiff has endured, if any, as a result of injuries unlawfully inflicted by the defendant, as I have instructed you.

The plaintiff in this case claims that he has been to expense in curing himself, and he asks special damages on account of said expenses and care and nursing. Now I say to you, if you find from the evidence in this case that the defendant is liable, the plaintiff would be entitled to recover such sum (not exceeding —— dollars) that he has shown you by the evidence that he has expended in that behalf, if any. He would not be entitled to recover any more for any special damages than he has shown you by the evidence to have incurred.

In assessing damages, if you find that the plaintiff is entitled to recover in this action, and you further find that the defendant acted maliciously, then you have the right, if you think proper, to go beyond the mere compensation and award exemplary or punitive damages, as a punishment to the defendant..¹

The plaintiff is not entitled to this last item of damages as a matter of right. It is entirely in your discretion to allow it or not for the purpose of a punishment. If you find that the plaintiff acted maliciously, you may in your estimate of compensatory damages, take into consideration and include reasonable fees for counsel employed by the plaintiff to prosecute this action.

In no event would the plaintiff be entitled to recover more than (—— dollars) the amount asked for in his petition..²

¹ *Stevenson v. Morris*, 37 O. S. 10, 19-20. In a tort which involves the ingredient of fraud, malice, or *insult*, exemplary damages may be awarded and counsel fees may be allowed. *Roberts v. Mason*, 10 O. S. 277; *Finney v. Smith*, 31 O. S. 529.

² *Voris, J.*, in *Pford v. Pixley*, Summit County Common Pleas.

Sec. 1506. Effect of conviction in criminal prosecution on civil damages.

The fact that the defendant has been convicted and fined for the assault and battery is not a bar to the right of the plaintiff

to recover compensatory damages for any injuries you may find he sustained. Before adding any sum to your verdict by way of punishment and example, if you find the same to be evident under our instructions to you, it will be well for you to consider the punishment, fine and cost adjudged against the defendant in the criminal prosecution, but this evidence can be considered under no circumstances for the purpose of lessening the compensation of the plaintiff for the injuries actually sustained, but may be only for the purpose of aiding you in determining whether any other sum, and if any, how much, should be added by way of punishment and example in addition to that awarded in the criminal prosecution.¹

¹ Voris, J., in *Otto v. Mills*, Summit Co. Com. Pleas. A civil remedy for damages for injury is not merged in an indictment for the same act. 4 O. 376; 19 O. S. 462; 5 W. L. J. 356.

CHAPTER LXXII.

ASSAULT WITH INTENT TO KILL.

SEC.

1507. Assault with intent to kill—
Complete charge.

SEC.

1508. Assault with intent to kill—
Includes lesser grades.
1509. Assault—Battery—Intent.

Sec. 1507. Assault with intent to kill—Complete charge, embracing:

- a. *Statement of case.*
- b. *Plea of not guilty—Burden of proof.*
- c. *Concise definition of reasonable doubt.*
- d. *Credibility of witnesses.*
- e. *Reputation of prosecuting witness.*
- f. *Statute as to crime.*
- g. *Jury not concerned with penalty.*
- h. *Who started the affray.*
- i. *Law as to assault.*
- j. *Plea of self-defense—Burden of proof and degree of evidence.*
- k. *Malice.*
 - l. *Intent to kill.*
- m. *Proof of intent to kill.*
- n. *Direction to jury as to finding and verdict.*
- o. *May find defendant guilty of assault.*

a. *Statement of case.* Gentlemen of the jury, the charge made against the defendant is an assault with intent to kill. In the language of the indictment it is charged that the defendant did, on the ———, unlawfully make an assault upon F. W. and did unlawfully strike and wound, with intent, him the said F. W. then and there unlawfully, purposely and of deliberate and premeditated malice, to kill.

b. *Plea of not guilty—Burden of proof.* The defendant having entered a plea of not guilty, the burden is upon the State to prove all of the essential elements of the crime charged beyond a reasonable doubt. There is no presumption of guilt from the indictment preferred against the defendant; on the contrary, it is presumed that the defendant is innocent of the crime charged against him until his guilt is established beyond a reasonable doubt, which is the degree of proof required in criminal cases. That is, before you may find the defendant guilty, you must be satisfied of the existence of all the essential elements of the crime charged beyond a reasonable doubt. If the jury entertain a reasonable doubt of the guilt of the defendant, then it is your duty to acquit him.

c. *Concise definition of reasonable doubt.* A reasonable doubt is an honest uncertainty existing in the minds of a candid, impartial, diligent jury after a full and careful consideration of all the testimony with an honest purpose to ascertain the truth, irrespective of the consequences which may follow the verdict of the jury. It is not a mere captious or speculative doubt, one voluntarily excited in the mind in order to avoid the rendition of a disagreeable verdict; it is not a doubt created by any personal feeling of sympathy, or of opinion or policy not based upon the testimony; such a doubt is considered in law as merely a captious and as an unreasonable one. To acquit upon trivial suppositions and remote conjectures is a virtual violation of your oath, and an offense of great magnitude against the interests of society, directly tending to the disregard of the obligation of the judicial oath, and countenancing a disparagement of justice and the encouragement of malefactors.

On the other hand, the jury ought not to condemn unless the evidence removes from your minds all reasonable doubt as to the guilt of the accused and you would venture to act upon it in a matter of the highest concern or importance in your own interest.

You will be justified and are required to consider a reasonable doubt as existing if the material facts, without which guilt can

not be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always attainable; from the nature of things, reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt and satisfies the mind to a reasonable certainty, a mere captious, or ingenious, artificial doubt is of no avail; if a consideration of all the evidence satisfies you of the defendant's guilt, you will return a verdict of guilty; if you are not so satisfied, but a reasonable doubt or uncertainty as to the guilt of the defendant exists in your minds, it is your duty to acquit him.

Whether or not the proof of the guilt is brought out beyond a reasonable doubt need not be necessarily shown by the greater number of witnesses, but may be determined by the jury by the greater weight of credible testimony which convinces the jury of guilt beyond a reasonable doubt.

d. *Credibility of witnesses.* The jury, in considering the credibility of witnesses, should consider their interest in the liberty of the accused, their opportunity to see and know the facts, the consistency of their testimony with all the facts and circumstances appearing in the evidence; and if your judgment so demands, you may conclude that the guilt of the defendant is established beyond a reasonable doubt, notwithstanding a less number of witnesses may have given testimony in behalf of the State. The credibility of the witnesses, as I say, gentlemen, is entirely within your discretion.

You may give them such credit as you, in your best judgment, deem proper, considering all of the circumstances appearing in this case. A court may call your attention to some of the general things that may be considered. I have mentioned a few: that is, the interest which any one may have, the interest which the defendant may have in his liberty, the interest which any one may have who has testified in his behalf, in his liberty, the question whether or not the persons who have testified on behalf of the State are doing it with the sole purpose and motive of a public duty, or whether there is any revenge or malice or

spite work; you may consider all those matters, or anything that occurs to you that ought to be considered in determining the credibility of the witnesses as applied to the evidence in this case.

e. *Reputation of prosecuting witness.* Evidence has been introduced as to the reputation of the prosecuting witness, W., for peace and quiet, the object of which is to reflect upon the question of W.'s having attacked the defendant; all the court need to say is that you will give, weigh and consider that testimony, and give it such weight as you, in your best judgment, deem proper.

f. *Statute as to crime.* The statute relative to this crime is as follows: "Whoever assaults another with intent to kill shall be imprisoned in the penitentiary," and so forth.

g. *Jury not concerned with penalty.* Now, gentlemen, you have nothing whatever to do with the penalty in this case; you should be true to your oaths and absolutely banish the question of consequences and penalty from your minds while you are considering this verdict.

There is no higher calling, gentlemen of the jury, than for twelve men to go into the box and consider and weigh the evidence and know no person on earth excepting to do your duty.

Counsel have, in their argument, referred to your sending this defendant to the penitentiary by your verdict. Now, that is not proper. It is not proper for you to consider. I mention that to you because I read you the statute and I want you to bear it in mind.

h. *Who started the affray.* In deciding the question presented by the indictment in this case, it will be necessary for you to determine who started this affray, whether it was the defendant or whether it was the prosecuting witness, W. It is claimed on behalf of the State that the defendant made the assault upon W.; that is, the first assault, and that the latter—W.—made no assault upon the defendant at all, and that all that W. did was merely to defend himself.

On the other hand, it is claimed by the defendant that W. made the first assault upon him, that is, the defendant, and that

he struck W.—that is, the defendant struck W.—merely to repel an attack made upon him by the prosecuting witness, W.

i. *Law as to an assault.* The jury are the sole judges of the facts in this case. To enable you to decide between the two claims of the parties—the State and the defendant—the court instructs you as to the law applicable thereto. The law is that whoever assaults another in a menacing manner is guilty of what is termed in law a simple assault. To be guilty of a mere assault upon another, it is not essential that the one making it should actually strike the person, it being sufficient merely that the one making the assault should approach another, and in a menacing or threatening manner. Mere words or threatening language will not alone constitute an assault, but threatening language accompanied by menacing conduct or words is sufficient in law and constitute an assault. Now, if the jury believe or should find from the evidence that the defendant here by his own conduct did make an assault, in the manner and according to the law as I have defined it to you, upon the prosecuting witness, W., and that that assault was made in a menacing manner, and that the prosecuting witness, W., did no more than to use such reasonable means as were reasonably necessary to protect himself, and that the defendant, without adequate cause and unnecessarily, hit or struck W., then you would be warranted in finding the defendant guilty of an assault. And if you should find, or if you should believe that he is guilty of assault, it will then be necessary for you to further consider and determine with what intent the defendant committed the act, as to which the court will instruct you directly.

If, however, you should find that the defendant did not make the first assault upon W. and that he did no more than use language which provoked W., and that W. made the first assault upon the defendant, and that defendant struck W. to defend himself against attack, and that he used no more force and violence than was reasonably necessary to defend himself, then your verdict should be one of acquittal.

j. *Plea of self-defense—Burden of proof and degree of evidence.* The defendant, having invoked the plea in his behalf

that what he did was done by him in self-defense, the jury are instructed that the law places the burden of proving this plea of self-defense upon the defendant himself, and the degree of evidence necessary to establish this defense is different from that required to establish his guilt; that is, the defendant must establish this plea of self-defense by what is known and termed in law as a preponderance of evidence. And a preponderance of evidence, in plain language, simply means the greater weight of credible testimony, not necessarily the greater number of witnesses, but the greater weight of credible testimony, viewing the testimony according to the rules and tests that the court has already suggested.

If you should reach the conclusion in your minds that the defendant did not act in self-defense, but you should be satisfied beyond a reasonable doubt that the defendant was guilty of an assault, then it will be your duty to inquire and determine whether or not the defendant made the assault with intent to kill.

k. *Malice.* Malice is an essential ingredient of the crime of assault with intent to kill, which is the charge here. In law the intent to kill involved in this crime must be a malicious intent to kill. If you should find that the defendant did commit an assault, then you are instructed that it is your duty to look and determine whether or not the defendant made the assault upon W. with the malicious intent then and there to kill him.

Malice, in law, does not necessarily mean personal ill will or hatred by one towards an individual, although that may enter into the consideration of what constitutes malice to some extent, but malice, in law, is used to designate that state of mind which prompts a conscious violation of the law to the prejudice of another. It is indicative of a mind void of all social duties and obligations imposed by law upon the person charged with crime by virtue of his social relations.

Before you can make any finding that the defendant committed the assault as charged with a malicious intent to kill

W., you must find from the evidence that the defendant was actuated by malicious intent.

1. *Intent to kill.* The intent to kill involved in the crime charged here is what is termed in law a specific intent. It is distinguishable and materially different from the criminal intent present in a mere assault and battery, which is also involved in this charge and charged by the indictment. The intent in the crime of assault and battery merely—that is, in mere assault and battery—may be inferred by and charged from the wrongful act of assaulting and beating another. An intent in such case is an intent to cause mere bodily injury. The intent to kill involved in the crime of assault with intent to kill means that the person charged with the crime must have intended to kill the person assaulted; the intent to kill must be a malicious intent to take the life of the person assaulted, malice, as already stated, not necessarily meaning ill will, but a wicked or depraved heart fatally bent on mischief.

It is simply your duty, gentlemen, to find and determine, as you would determine any other fact in this case, whether the defendant committed the assault with intent to kill W. and with malice as these terms have been explained to you. Being a question of fact, it must be determined by you from all the facts and circumstances as shown by the evidence and beyond a reasonable doubt.

m. *Proof of intent to kill.* It is not always possible to prove an intent to kill, nor is it essential in law that it should be established by what is known as direct testimony. It may be inferred from any evidence if the jury are satisfied that any facts have been established from which intent may reasonably be inferred. In arriving at a conclusion of the existence or non-existence of the intent to kill, the jury may consider any declarations of the defendant, if any you find that he made; you may consider the nature and character of the assault, if you find that he made one, without just excuse or justification; whether any means or methods were used which were, in your judgment, reasonably calculated to cause death. If the jury should be of the opinion

that the club used by defendant in striking W. was calculated to cause the death of W., then the jury may infer an intent to kill; and if you find beyond a reasonable doubt that the defendant did assault W. and that he did it with an intent to kill, then it is your duty to render a verdict of guilty of assault with intent to kill.

n. *Direction to jury as to finding and verdict.* But if, after a consideration of all the evidence, there remains in your minds a reasonable doubt as to whether defendant did assault W., or whether, though he did assault him, he actually intended to kill W., then it would be your duty to acquit him of the crime of assault with intent to kill. But if you should be of the opinion that the defendant did not commit the assault with intent to kill, it will, nevertheless, be your duty to consider and determine whether or not he is guilty of an assault and battery. The indictment charges that the defendant unlawfully assaulted and beat the said W. When a person is charged with an assault with intent to kill and the jury entertains a reasonable doubt of his guilt, they may acquit him of the assault with intent to kill and may find him guilty of assault and battery.

o. *May find defendant guilty of assault.* Any unlawful beating or other wrongful physical violence inflicted on a human being without his or her consent and without excuse or cause constitutes an assault and battery. An intent to assault and injure a person may be inferred, as already stated, from an unlawful assault and battery, should you find one to have been committed by the defendant beyond a reasonable doubt.

The crime of assault with intent to kill embraces within that charge not only assault and battery, but a simple assault; and the court has defined those terms to you, all of them; and you may acquit him of assault with intent to kill and find him guilty of assault and battery, or you may acquit him of assault and battery and find him guilty of assault, according to your own judgment, applying the law as the court has endeavored to give it to you.¹

¹ *State v. Snyder*, Frank. Co. Com. Pl., Kinkead, J.

Sec. 1508. Assault with intent to kill—Includes lesser grades.

“If you should find from the evidence that had death resulted from the assault, the killing would have been manslaughter only, then you should find him, the defendant, guilty of assault and battery only, and not guilty of assault with intent to kill. But if you should find that such killing, had death resulted, would have been murder in the first degree or murder in the second degree, then you should find the defendant guilty as charged in the indictment.”¹

¹ *State v. Stout*, 49 O. S. 270.

Sec. 1509. Assault—Battery—Intent.

“You will inquire whether there was an assault with intent to murder. An assault is an attempt or offer, with force and violence, to do some corporal hurt to another. If the attempt or offer be carried into effect, there is more than an assault; there is battery also, and the only question is as to the intent. Was it to commit murder? In other words, if M. had been killed, would the prisoner be guilty of murder? If they were attempting to commit a burglary, it would have been murder in the first degree. If not, and they had yet killed him maliciously, it would have been murder in the second degree. Either will satisfy the statute. But if you think the killing would have been manslaughter only, you can not convict. And this must be the case, if you believe, either that there was no intention to kill, or, if an intention, that it was the effect of passions, roused in a sudden quarrel, and that there was no malice, that is, no culpable disregard of another’s rights.”¹

¹ Timothy Walker in *Ohio v. Shields*, 1 W. L. J. 118, quoted in *State v. Stout*, 270.

CHAPTER LXXIII.

ATTORNEYS.

SEC.

1510. Breach of contract of employment — Contingent fee in collection of account.

1511. Presumption from employment of an agreement to pay reasonable compensation.

SEC.

1512. Action to recover fees, governed by same principles as other employment.

1513. *Quantum meruit*, when no special contract.

1514. Facts to be considered in determining value of services.

1515. Expert opinion as to value of services.

Sec. 1510. Breach of contract of employment—Contingent fee in collection of account.

The jury is instructed that where an attorney at law accepts an account for collection with an agreement that he is to have as compensation a certain per cent. of the amount collected, and the client, without sufficient cause, and without giving the attorney a reasonable time to make collection, wrongfully takes the account out of the hands of the attorney, the latter is entitled in such case to recover damages for such breach of contract, provided it is made to appear that the claim so placed in his hands was valid and collectible.

In such case the measure of damages is the amount of compensation stipulated for the contract, which, however, is not dependent upon what was finally collected on the account by another.¹

If, therefore, the jury finds, etc.

¹ Scheinesohn v. Lemonek, 84 O. S. 424; Am. Ann. Cas. 1912 C. 737, and note.

Sec. 1511. Presumption from employment of an agreement to pay reasonable compensation.

The jury is instructed that when one enters into a contract to employ an attorney in a particular service, it is presumed

that such person undertakes and agrees to pay such attorney for his services such an amount as under all the circumstances they are reasonably worth.¹

Walnut Hills S. &c., Co. v. Haley, 8 N. P. 557.

Sec. 1512. Action to recover fees, governed by same principles as other employments.

The jury is instructed that an action brought by an attorney at law to recover for professional services depends upon the same principles, and is governed by the same rules that apply to other actions brought to recover for services rendered in any lawful employment.¹

¹ Kittridge v. Armstrong, 28 W. L. Bull. 249.

Sec. 1513. Quantum meruit when no special contract.

The jury is instructed that when an attorney at law seeks by action to recover for services rendered by him to a client, and no special contract is made between the parties concerning the compensation which the attorney shall receive for his services, the rule of law is that such attorney, the plaintiff herein, is entitled to recover upon the *quantum meruit*, that is, what his services are reasonably worth, so much as the services may be worth, so much the services deserve.

The burden rests upon the plaintiff to prove the work or service rendered by him for the defendant, as well as what the same was reasonably worth.¹

¹ Kittridge v. Armstrong, 28 W. L. Bull. 249.

Sec. 1514. Facts to be considered in determining value of services.

In estimating and determining the reasonable value of the services rendered by plaintiff, the jury should take into consideration the nature and importance of the controversy in which the service was rendered, the novelty, the intricacy and doubtfulness of the questions involved, the amount in controversy, the

nature of the services required of the lawyers, their standing in the profession for learning and skill and proficiency in their employment, together with the result accomplished. The reasonableness of the compensation is to be determined by the jury from the evidence like any other controverted fact, and not according to the personal views of jurors. The jury must consider and be guided only by the evidence.¹

¹ *Kittridge v. Armstrong*, 28 W. L. Bull. 249, Hunt, J.

Sec. 1515. Expert opinion as to value of services.

The law permits persons familiar with the value of the services of a lawyer to give an opinion as to what they are worth, since no market value can be placed on such services. Experts or witnesses shown to be skilled, learned or experienced in the subject of controversy in an action may be permitted to give their opinion upon a given state of facts, that is, those claimed to have been proven by the evidence in an action.

The evidence of experts as to the value of professional services does not differ in principle from such evidence as to the value of any other labor or services rendered in any line of labor, trade or business. The legitimate purpose thereof is to give aid and enlightenment to the jury concerning the value of services in controversy. It is the province and duty of the jury to weigh and consider the evidence of the attorneys who have given testimony as to the value of the services, together with all the other evidence touching their nature, the time occupied and the attending circumstances.

The jury will keep in mind the distinction between original evidence and opinion evidence given by the attorneys, it being within your exclusive province to give such weight to the opinions concerning the value of the services by the several witnesses as you, in your judgment, deem proper.¹

¹ See *Kittridge v. Armstrong*, 28 W. L. Bull. 249.

CHAPTER LXXIV.

AUTOMOBILES—INJURY BY.

(See BAILMENTS.)

SEC.

1516. Relation of employer, or owner, and chauffeur.

1517. Liability of owner who hires auto with his licensed chauffeur to another, to be used for a definite time, and for specified fee.

1518. Master loaning servant to another becomes liable for his acts.

1519. Liability of garage owner who hires out automobile with driver, where hirer exercises no control over driver except to give directions as to routes.

1520. Duty of one operating sight-seeing automobile.

1521. Liability of owner for injury from acts of driver alleged to have taken car under express or implied authority for taxi-service, denied by owner.

1. Statement of questions.
2. Ownership not evidence of agency—Burden of proving agency.
3. Test of master's liability—Was servant in the course or scope of employment.
4. Was drunk.

SEC.

1522. Ownership of machine and operation thereof by servant employed for that purpose create *prima facie* liability—But under general denial the burden is on plaintiff to prove that such servant was engaged in business or service of master.

1523. Injury to person while crossing street from collision with automobile running at high rate of speed—Contributory negligence of plaintiff—A complete charge.

1. Statement of questions.
2. Burden on plaintiff to prove negligence of defendant; on defendant to prove plaintiff's contributory negligence.
3. Degree of care, and credibility of witnesses.
4. Negligence as applied to drivers of automobiles in streets and to travelers therein, defined.
5. Relative rights and duties of drivers of automobiles and pedestrians in streets.

SEC.

- 6. Duty of driver of automobile to negligent pedestrian.
- 8. Was negligence of defendant proximate cause of injury—Proximate cause defined.
- 9. Concurrent negligence.
- 1524. Driver must anticipate meeting pedestrians at street crossing.
- 1525. Duty of driver to give signals at street crossing, and to adopt other precautions.
- 1526. Duty of drivers as to speed—The statute.
- 1527. Same—Violation of statute—*Prima facie* negligence—Not conclusive.
- 1528. Duty of drivers in meeting others driving in streets—Reasonable lookout—Control of machine.
- 1529. Driver, keeping lookout, having car under reasonable control, may assume pedestrian will not suddenly turn backward.
- 1530. Pedestrian going unexpectedly in front of auto.
- 1531. Warnings given pedestrian causing bewilderment.
- 1532. Driver running excessive rate of speed approaching crossing—Gives no signal—Pedestrian placed in sudden danger—Not negligent if injudicious choice made between hazards.
- 1533. Automobile, lawful means of conveyance—Equality of right between driver and pedestrian.
- 1534. Correlative duties of driver of auto and pedestrian.

SEC.

- 1535. Ordinance as to passing vehicles and carrying lights—How considered.
- 1536. Operator of auto may assume persons at street crossing will exercise ordinary care.
- 1537. Driver of auto and other vehicle both negligent—Concurrent negligence—Proximate cause.
- 1538. Whether driver of auto acting as agent or servant of owner—Or whether person hired it for himself alone.
- 1539. Equality of right of street railway and driver of automobile—Relative duties of each—Familiarity of driver with crossing.
- 1540. Duty of driver of auto at railroad grade crossing.
- 1541. Driver of automobile placed in sudden peril through neglect of another.
- 1542. Injury by collision between two automobiles—Plaintiff charges excessive speed causing injury to her machine—Defendant counterclaims for injury to his machine by same collision.
 - 1. Statement of claims of plaintiff and defendant.
 - 2. Burden of proof.
 - 3. Credibility of witnesses—Testimony and evidence distinguished—Ultimate fact to be found.
 - 4. Negligence of party to be determined—Negligence in the use of automobiles in city.

SEC.

5. Duty of driver in approaching street intersection.
6. Driver of autos required to observe law of road.
7. Duty as to speed.
8. Both parties claiming relief, but one can recover.
9. Minor son of defendant driving—His authority—Liability of father for negligence of son.
10. Same continued—Automobile, though not dangerous instrumentality, still may become so, if recklessly driven—Effect of legislative regulations.
11. Same continued—Implied authority by father to son to use and drive auto.
12. Same continued—Jury to determine whether negligence of either plaintiff or defendant caused collision.
13. Same continued—Contributory negligence and concurrent negligence as applied to case.
14. Precautionary instruction as to description of speed by witnesses.
15. Direction as to verdict.
1543. Injury to passenger in automobile, the guest of hirer from owner, who furnishes chauffeur to drive—Liability dependent upon contract of hiring, as well as upon whether driver is engaged in the service and business of the owner.

SEC.

1. Under general denial plaintiff bound to prove use of machine by hirer within bailment of hiring, as also that chauffeur was engaged in service and business of master.
2. Credibility of witnesses—What to be considered—Men and women on "joy ride," using intoxicating liquors.
3. Plaintiff must show chauffeur to have been within the business of owner.
4. Intoxication of passengers, and chauffeur—Presence of liquors in car at time of wreck—Contributory negligence of plaintiff in use of liquors, so as to be unable to use ordinary care—Circumstantial evidence—Inferences.
5. Evidence that chauffeur permitted another to drive car at time of injury, and as to intoxication, consisting of declarations as part of *res gestae*.
6. Driver permitting another to drive machine departs from duty and service of master.
7. Scope of employment and service of chauffeur, to be determined by contract of hiring.
8. Assessment of damages—Fair and reasonable compensation, to both defendant and plaintiff.

Sec. 1516. Relation of employer, or owner and chauffeur.

The jury is instructed that the acts of the chauffeur, in operating an automobile, within the authority of his employment, are the acts of a servant. The relation of master and servant exists between the chauffeur and his employer, and the rules of law applicable to that relation apply.¹

¹ *Hannigan v. Wright*, 5 Pennew. Del. 537, 540; *Babbitt Motor Vehicles*, sec. 546; *Cunningham v. Castle*, 111 N. Y. Supp. 1057, 1062.

Sec. 1517. Liability of owner, who hires auto with his licensed chauffeur, to another to be used for definite time, and for specified fee.

The jury is instructed that a person [or corporation] engaged in the business of letting out automobiles for hire has certain obligations and duties which are required of him in law, and which are imposed because of the nature and character of such machines. The management of an automobile should only be intrusted with one who is qualified by knowledge and experience to properly run, manage and control the same. The dangers incident to their use in the highways from improper use, control and management of the same are such that the state has enacted certain police regulations applicable to their use. The law will not permit such vehicles to be run in the highways without a license, and not otherwise, except by a licensed chauffeur, unless the same be driven by an owner. The danger of loss and injury to property as well as of personal injury to persons riding in the machines as well as those traveling in the highways, unless carefully and prudently managed and controlled, is such as to require the exercise of care in their use such as is commensurate with the dangers incident to such use.

Where control and management of the machine is given up to a hirer, the owner is required to furnish a competent driver of the same.¹

The jury, therefore, is instructed that where the owner of an automobile lets or hires it out to another, with a licensed chauffeur,

feur in his employ in charge of it under contract and agreement, by the terms of which the owner is to receive a definite sum for the use of such car, together with the driver during the period of hiring, such owner under such contract of hiring is responsible and liable under the law for the acts and conduct of the chauffeur in the management, control and driving of the automobile during the period of time covered by such employment.²

¹ The reason for the rule of law above stated may be omitted if thought best; they are those, however, cited in the authority below cited.

² *Shepard v. Jacobs*, 204 Mass. 110; 26 L. R. A. N. S. 442; 134 Am. St. 648; 90 N. E. 392.

Sec. 1518. Master loaning servant to another becomes liable for his acts.

The jury is instructed that a master may lend his servant, with consent of the latter, to another person for service in the business of the other, and that while engaged in the business of the other person and in all respects subject to his direction and control, he becomes the servant of the new master, and this master becomes liable for his negligence. In determining whether, in a particular act, he is the servant of his original master or of the person to whom he has been furnished, the general test is whether the act is done in business of which the person is in control of as a proprietor, so that he can at any time stop it or continue it, and determine the way in which it shall be done, not merely in reference to the result to be reached, but in reference to the method of reaching the result.

The jury is instructed that while such servant is engaged in the business of the one to whom he has been loaned, and while engaged in the business of the latter and if he is in all respects under his direction and control, he becomes the servant of the new master, who becomes liable for the negligence of the servant.¹

¹ *Shepard v. Jacobs*, 204 Mass 110; 90 N. E. 392; 134 Am. St. 648; *Sacker v. Waddell*, 98 Md. 43; 103 Am. St. 374.

Sec. 1519. Liability of garage owner who hires out automobile with driver, where hirer exercises no control over driver except to give directions as to route.

The jury is instructed that a chauffeur sent by the owner of a garage to operate an automobile leased for a pleasure ride, and who obeys the directions of the person hiring the car, and who does no more than to follow and obey the directions given by the hirer as to the routes or places where the machine is to be driven, is the servant of the owner of the automobile and garage and not of the person hiring the same. Hence it follows that the owner of the automobile and garage is responsible and liable in law for any acts of negligence of such servant or chauffeur committed by him within the scope of his employment, as well as the service of his employer or master.¹

¹ *Gerretson v. Rambler Garage Co.*, — Wis. —; 136 N. W. 186; 40 L. R. A. 457.

Sec. 1520. Duty of one operating a sight-seeing automobile.

The jury is instructed that one who operates a sight-seeing automobile over regular routes in a city, which he holds out to the public for common carriage of all who may desire to take passage therein, and which he invites the general public to patronize for hire, owes to the patrons or to those becoming passengers therein, the duty of exercising, in the management, operation and control of such vehicle, the highest degree of care consistent with the proper and ordinary transaction of the business so being conducted.¹

¹ *Hinds v. Steere*, 209 Mass. 442; 95 N. E. 844; 35 L. R. A. 658. The highest degree of care was imposed in this case because it was regarded as a common carrier. But the courts have not extended that measure of care to ordinary hiring.

Sec. 1521. Liability of owner for injury from acts of driver alleged to have taken car under express or implied authority for taxi-service, denied by owner.

1. *Statement of questions.*
2. *Ownership not evidence of agency—Burden of proving agency.*

3. *Test of master's liability*—Was servant in the course or scope of employment?
4. *Was driver of auto within scope of employment and engaged in master's business at time of injury?*

1. *Statement of question.* The question for the jury to determine is whether L. had authority, either express or implied, from A. to take the machine out and hire it to C. during the period of time which L. had it and to drive it to the place or places where it was driven. If L. did have such authority, was he acting within the scope of such express or implied employment at the time of the injury, and was he guilty of negligence which caused the injury?

2. *Ownership not evidence of agency*—Burden to prove agency. Ownership of an automobile in and of itself is not to be taken as *prima facie* evidence that one who is driving it at a particular time is the agent of the owner.

The fact that one is shown to be the owner of an automobile which is being driven by another is not alone to be considered as evidence that the one who is driving it is an agent or servant of the owner.¹ The burden is upon one who complains of injury from being run down by the machine to show not only the fact that the person driving the car was the servant of the owner, but he is bound also to prove that such driver at the time of the injury engaged in the master's business, either with the express or implied knowledge and consent. So the burden is on plaintiff to prove by the greater weight of the evidence that the one who was driving the car in this case was at the time of the injury the servant or agent of the defendant, and that he was at such time engaged in the business or service of the defendant.

The claim asserted by plaintiff being that defendant had previously given general authority to L. to let out machines for hire, as well as that under all the circumstances plaintiff had impliedly given such authority, it is therefore incumbent on plaintiff to show either such express authority or to show by some fact, circumstances, declaration or act of the defendant

that he had impliedly authorized L. to let out or take out and to drive his automobile for hire. In deciding this, you may consider the location and the situation of the parties in their business in respect to their connection and location, as well as all that they may have said and done, if anything, touching the subject of hiring of machines owned by defendant, including the payment for the use of the car and its receipt by the defendant.

Where it is sought to hold the owner of an automobile for personal injury caused while it is being driven by another, the rules of law touching master and servant are to be applied. If you conclude that L. had no authority to hire out the machine, and that he took it out without authority, your verdict should be for the defendant. But if you find that L. had authority to hire out and drive the machine, then you will apply the rules of law pertaining to master and servant, and consider and determine the question whether L. was acting within the scope of his employment at the time of the injury.

3. *Test of master's liability*—*Was servant in the course or scope of employment?* The test of the master's liability for the act of a servant is whether the servant was acting at the time within the scope of the employment, and as well whether the act was done in the prosecution of the business in which the servant was employed to assist.² The term "in the course or scope of employment or authority" means while engaged in the particular employment or authority. That is, it means while engaged in the service of the master, or while about the master's business. It does not mean during the period covered by the employment. It does not embrace any service after the discharge of L. by C., except to cover the trip by L. from Cincinnati to Columbus; whether L. at the time of the accident was acting within the scope of his employment or service, involves an inquiry into the contract of his employment, if any there was, and the relation of his acts at the time of the accident to the service actually performed in his employment, if there was any employment.

For acts done by L. in any sense warranted by express or implied authority, the ultimate inquiry in this case concerning the relation between the parties, resolves itself into one of fact under the particular evidential facts in this case which it is the province of the jury to determine.

4. *Was driver of auto within scope of employment and engaged in master's business at time of injury?* The jury is instructed that if L. had either express authority, or if the facts and circumstances warrant the inference of an implied authority to him, to hire out and drive the machine, it had relation to performing the service of hiring the car to C. and to driving it for him according to his wishes and directions. That is what the scope of particular employment embraced or included, if there was such employment. If you find that L. took the machine with authority and was engaged in the service of driving the same for C. as hirer thereof, the jury will determine whether at the time of the accident or injury, he was engaged not only within the scope of the particular employment, but within the line of service and business of such employment.

A master may be held liable for the act of a servant only when the latter is acting within the express or implied authority of the master, when engaged in his business within the course of the employment, or when performing the particular work or service for which he was engaged.

If the jury find that L. was authorized to hire out and to drive the car, still the defendant may not be held liable as master for the acts or neglect of L. as servant, if at the time of the injury he had departed from the business and service of the defendant, and was not acting in pursuance of the general purpose of the employment, or in relation to the master's work.

An owner of an automobile can not be held responsible for injury caused by one who has taken it under either express or implied authority, who has departed from the scope and purpose of the legitimate use or employment of the machine, and who is at the time engaged in driving the same for his own pleasure and enjoyment.

There can be no liability on the part of the defendant if the jury find that L., at the time of the accident, was not acting in pursuance of any request or direction of C. (hirer). If, at the time, he was not driving the car in pursuance of the contract of hiring, and if he was not driving it by the direction of the person who hired it, but instead thereof he was driving it for his own business or pleasure, the defendant can not be held for the consequences of L.'s acts of neglect when so driving the automobile.

If the jury find that C. (the hirer) had paid L. in full for his services and the use of the machine; if C. did not thereafter authorize or request L. to drive the car on Sunday evening when the accident occurred, then you are instructed that the defendant can not be held responsible for his acts at that time, even though you may find that the relation of master and servant existed between defendant and L., because whatever the latter did under such circumstances was on his own account and was beyond the scope of the particular employment and not within the business of the defendant.

If you find that C. paid L. in full for the use of the automobile, and the contract of hiring was at an end, except that there remained nothing for L. to do but to return the car from Cincinnati to Columbus, and that subsequently thereto he was driving the car in Cincinnati for his own pleasure, your verdict should be for the defendant.³

¹ Lotz v. Hanlon, 217 Pa. St. 339; White Oak Coal Co. v. Rivoux, 88 O. S. 31. [See *ante*, chapter, BURDEN OF PROOF.]

² White Oak Coal Co. v. Rivoux, *supra*.

³ Modeled from Lorenz v. Adamson, Franklin County Common Pleas (Kinkead, J.). L. & A. occupied the same building, L. having a repair shop, and A. an automobile sales agency. L. hired the machine of A. out, driving it himself.

"The owner of an automobile is not liable in an action for damages for injuries to or death of a third person caused by the negligence of an employe in the operation of the automobile, unless it is proven that the employe, at the time, was engaged upon his employer's business and acting within the scope of his employment." White Oak Coal Co. v. Rivoux, 88 O. S. 31.

Sec. 1522. Ownership of machine and operation thereof by servant employed for that purpose create prima facie liability—But under general denial the burden is on plaintiff to prove that such servant was engaged in business or service of master.

The jury is instructed that where it is shown that a person is the owner of an automobile and that while it is being run and operated by a servant and agent of such owner who is employed under express or implied authority to drive and operate the same in the business of the master, and such servant is guilty of negligence in the handling and operation of such machine, the owner in such case and under such circumstances is *prima facie* liable for injury done by and through the neglect of such servant.¹

But where the defendant makes a general denial of a claim for recovery against him because of the negligence of his driver and servant, the "burden," so called, or rather the plaintiff is bound to produce the *quantum* of evidence—a preponderance thereof—to prove that such servant or chauffeur was not only acting within the scope of his employment, but that, at the time of the injury complained of, he was engaged in the service and business of his master, the owner of the automobile. The defendant not being bound to do more than to introduce evidence to countervail the *prima facie* case made by plaintiff by proof that the person in charge of the machine was regularly employed by defendant to drive and operate the automobile, the burden and obligation still remain on plaintiff throughout and on the whole case to establish, by the greater weight of the evidence, the fact that the servant at the time of the injury was engaged in the service and business of the defendant.²

¹ White Oak Coal Co. v. Rivoux, 88 O. S. 31.

² Klunk v. Railway, 74 O. S. 125.

Sec. 1523. Injury to person while crossing street from collision with automobile running at high rate of speed—Contributory negligence of plaintiff—A complete charge.

1. *Statement of questions.*
2. *Burden on plaintiff to prove negligence of defendant; on defendant to prove plaintiff's contributory negligence.*
3. *Degree of evidence and credibility of witnesses.*
4. *Negligence as applied to drivers of automobiles in streets and to travelers therein, defined.*
5. *Relative rights and duties of drivers of automobiles and pedestrians in streets.*
6. *Right and duty of person in crossing street.*
7. *Duty of driver of automobile to negligent pedestrian.*
8. *Was the negligence of defendant the proximate cause of the injury.—Proximate cause defined.*
9. *Concurrent negligence.*

1. *Statement of questions.* The questions are, whether the defendant was guilty of the negligent conduct which was the proximate cause of the injury, and whether the plaintiff himself was guilty of negligence which proximately contributed to the injury complained of by him.

The act of negligence charged by the plaintiff against the defendant is that the latter was running at a high rate of speed, at least fifteen miles an hour.

The defendant denies that he was guilty of any negligence.

2. *Burden on plaintiff to prove negligence of defendant; on defendant to prove plaintiff's contributory negligence.* The burden of proving that the defendant was negligent in the particulars charged, and that his negligence was the proximate cause of the injury complained of, rests upon the plaintiff.

The burden of proving that plaintiff was guilty of contributory negligence as the proximate cause of the injury rests upon the defendant, unless the testimony introduced on behalf of the

plaintiff raises a presumption or inference of contributory negligence on his part, in which event the burden of proof devolves upon plaintiff, not only to rebut this presumption, but to establish the fact that there was no such contributory negligence on his part, or that it was not the proximate cause of the injury.

3. *Degree of evidence and credibility of witnesses.* The ultimate fact found by you from the evidence must be established by a preponderance of the evidence. This means that the fact which you find must be established by the greater weight of credible testimony, not necessarily by a greater number of witnesses. You may give such credence to the testimony as your judgment dictates, under the facts and circumstances developed in this case. You are the sole judges of the credibility of witnesses, and may give them such credit as seems proper to you under all the circumstances appearing in this case, considering their interest, or want of interest, in the case, their ability to learn, know and relate the facts.

4. *Negligence as applied to drivers of automobiles in streets and to travelers therein, defined.* Negligence is the failure to observe, for the protection of the interests of another, or of one's own interest or welfare, that degree of care, precaution and vigilance which the circumstances in this case reasonably demand. It is the failure to observe ordinary care under the circumstances appearing in this case. Ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to observe under similar circumstances. That is, ordinary care as applied to the conduct of the defendant in this case is such care as persons of ordinary care and prudence in driving and managing automobiles in streets of a city are accustomed to exercise and observe for the protection of persons traveling in the street; and ordinary care as applied to the plaintiff in this case is such care as persons of ordinary care and prudence observe in crossing streets, to avoid danger and injury to themselves arising from the driving of automobiles through the streets.

5. *Relative rights and duties of drivers of automobiles and pedestrians in streets.* The law is that automobiles have the

same rights in the streets of a city as any other vehicle running therein, and persons traveling on foot and in automobiles or driving automobiles in the streets of a city have equal rights; neither has a superior right. Equality of right in this case required that both the driver of the automobile and the plaintiff in crossing the street should have exercised ordinary care under the circumstances of this case. It was the duty of both parties in this case to have exercised their faculties of sight and hearing, the plaintiff for passing vehicles or automobiles, and for his own protection, the defendant for pedestrians in crossing the street.¹ Both had the right of way, and both were required to be cautious and to exercise that degree of care which the case demands. Both were bound to observe ordinary care to avoid collision.²

It was the duty of the defendant in driving his automobile to have observed ordinary care such as would have enabled him to observe the danger to the plaintiff, whether plaintiff was prudent or careful, or whether he was neglectful in observing the car of defendant as it was passing along the street and approaching him. A driver of an automobile in the streets of a city

¹ *Look and listen*: Said not always incumbent upon one about to cross a street car track, either on foot or with a team, to look and listen for street car. *Railway v. Kiner*, 17 C. C. (N.S.) 109.

Bound "to the alert and watchful performance of the duty of all travelers on all highways to look where they are going." *McIllhenney v. Pennsylvania*, 214 Pa. St. 44; *Bellevue v. Supply Co.*, 200 Mass. 237.

Mere failure to look and listen not necessarily negligent. *Murphy v. Armstrong*, 167 Mass. 199; *McCrohan v. Davison*, 187 Mass. 466; *Rogers v. Phillips*, 206 Mass. 308; *Babbitt, Motor Veh.*, secs. 271, 306.

² *Equality of right*. *Thompson on Neg.*, 2d ed., sec. 1300; *Babbitt Motor Vehicle*, sec. 913; *Bowser v. Wellington*, 126 Mass. 391; *Murphy v. Transfer Co.*, 167 Mass. 199; "It is as much the duty of foot passengers attempting to cross a street or road to look out for passing vehicles as it is the duty of drivers to see that they do not run over passengers." *Cotton v. Wood*, 8 Com. Bench Rep. 568; *Hennessey v. Taylor*, 189 Mass. 583; *West v. Transp. Co.*, 94 N. Y. Supp. 426; *Wilkins v. Transp. Co.*, 101 N. Y. Supp. 650; *Berry, Autos*, secs. 124, 125, 171. Rights reciprocal, *Babbitt Motor Veh.*, sec. 240.

must observe, and this defendant should have observed, such watchfulness as ordinary care and prudence demands for footmen, that is, pedestrians or travelers in the street—and must have his machine under ordinary control, and must take such steps in the handling of the car as ordinary care and prudence in such case demands, as will enable him to avoid injuring others who have equal rights in the streets. It is the duty of drivers of automobiles in the streets of a municipality to keep a vigilant watch ahead for vehicles and pedestrians³ and to give a signal by blowing their horn at crossings, and at other places than crossings in the street, when ordinarily necessary to warn foot travelers of danger. Whether or not ordinary care would have required the driver of the automobile under the particular circumstances of this case as developed by the evidence, is for the jury to decide. In doing so you may consider the conduct of the traveler, the plaintiff in this case, whether he was careless or negligent. It is your duty to determine whether or not the neglect to give such signal was a failure to observe ordinary care under the circumstances.

6. *Right and duty of person in crossing street.* The law is that a person in crossing the street is not restricted to the street crossings,⁴ although ordinary care required of a person in crossing at a place other than the street crossing might, and would, under the particular circumstances of a case, require him to observe greater vigilance for passing vehicles than if he was crossing at the regular street crossing, but that is nothing more than ordinary care under such circumstances, only varying according to the circumstances. A person crossing the street at a place other than the street crossing is bound to take notice of the rights of those driving automobiles or other vehicles in passing along the highway at such places; these rules are to be applied to the plaintiff's conduct in this case.

Ordinary care and prudence would require plaintiff, who was crossing the street at a place other than the regular crossing,

³ *McFern v. Gardner*, 121 Mo. App. 1, 10; *Berry Autos*, sec. 124.

⁴ *Babbitt Motor Vehicle*, sec. 268; *Keith v. Railway*, 196 Mass. 478; *Gerhard v. Ford Motor Co.*, 155 Mich. 618.

to be on the lookout such as would be reasonably necessary in the street at that time and place, in order to have avoided injury to him from the passing automobile of the defendant. This precaution does not countenance a person walking across the street without turning at all, depending upon the caution of drivers of vehicles or automobiles, but in crossing the street such person must have such realization of his condition and the surrounding circumstances as will enable him to respect the rights of drivers of vehicles or automobiles, and to observe such ordinary care as is essential under the circumstances for his own protection.⁵ This rule of care required of the pedestrian is an essential corollary to the rule of equality of right of drivers and pedestrians in the street. If the pedestrian was relieved of this care and caution and all the responsibility of watchfulness and care to avoid injury to pedestrians was placed upon the driver of the automobile, the right of the pedestrian would in such event be superior and not equal. I do not mean to say that one who is about to cross a street is bound to look in both directions, for that is not the law unless such rule is required in places of great congestion in the crowded thoroughfares of a city. Such a lookout is only necessary as will enable one in crossing the street to avoid injury or danger to himself from passing conveyances, such as automobiles.⁶ While one in crossing the street has a right to rely upon the care and prudence of one who is driving an automobile along the street, still it is his duty to observe ordinary care to avoid injury to him from passing automobiles.

7. *Duty of driver of automobile to negligent pedestrian.* While the law confers equal and correlative rights upon both the driver of an automobile and the pedestrian in the streets of a city, requiring each to observe ordinary care and vigilance in

⁵ This may seem a more stringent rule than some of the decisions seem to favor, but in congested centers such a rule is demanded. But the rule is well sustained. *Berry Autos*, sec. 171.

⁶ *Look out.* See *ante* note (1). See *Berry Autos*, sec. 171. Pedestrian not bound to keep continuously looking. *Hennessey v. Taylor*, 189 Mass. 583; 3 L. R. A. (N.S.) 345.

the use thereof, and to avoid injury, there still rests upon the driver of an automobile a duty to observe ordinary care and vigilance to avoid injury to a pedestrian who may not at the time be using his ordinary senses of sight and hearing and precaution for his own welfare and safety in crossing the street. It becomes the duty of the driver of the automobile under such circumstances to be on the lookout for persons who thus fail to observe ordinary care for their own safety, and when discovering a pedestrian so failing to observe such care for his own safety, to observe ordinary care to avoid injury to him by sounding a warning or giving a signal such as may be reasonably and ordinarily necessary under the circumstances,⁷ and to observe whatever precautions may be reasonable and ordinarily necessary under such circumstances to avoid injury to such pedestrians.

8. *Was the negligence of defendant the proximate cause of injury—Proximate cause defined.* If you should be of the opinion that the defendant was guilty of negligence in the management of the automobile which he was running, as shown in this case, it will then be your duty to determine whether or not his negligence was the proximate cause of the injury; that is, whether or not the negligence of the defendant was the cause of the injury. If you are of the opinion that both plaintiff and defendant were guilty of negligence as charged in their respective pleading, it will be necessary for you to determine which negligence, that of the defendant or that of the plaintiff, was the proximate cause of the injury.

Proximate cause is the act or conduct of another party which is the immediate cause of the injury, the negligent act but for which the injury would not have occurred. Was the cause of the injury to plaintiff in this case the negligence of the defendant in operating his car at a high rate of speed, as charged in the petition, or was it the negligence of the plaintiff in failing to observe ordinary care for his own protection while he was walking across the street, as charged in the answer of the defendant?

If you should find from the evidence that the defendant was guilty of negligence in the particulars charged and complained

⁷ Berry Autos, sec. 124; *Lampe v. Jacobsen*, 46 Wash. 533.

of in the petition, and that the same was the proximate cause of the injury to the plaintiff, it will be your duty to render a verdict in behalf of the plaintiff. On the other hand, if you should be of the opinion either that the defendant was not guilty of negligence, or if the defendant was guilty of negligence, yet you find that the plaintiff was guilty of negligence in failing to observe ordinary care for his own safety, and that his negligence was the proximate cause of the injury, then in such case your verdict should be for the defendant. If you find from the evidence that the defendant and the plaintiff were both guilty of negligence, you are instructed that the negligence on the part of the plaintiff can only operate to bar recovery by him when it is the proximate or immediate cause of the injury. If you should find that the plaintiff's own negligence exposed him to the risk of the injury of which he complains, he is nevertheless entitled to your verdict if you should find that the defendant, after he became aware or ought to have become aware of plaintiff's danger, failed to use ordinary care to avoid injuring him and the plaintiff was thereby injured. But in considering the negligence of both plaintiff and defendant, you may take into consideration the rule already mentioned, that each one, driver and footman in this case, had a right to rely upon the observance of ordinary care to avoid injury and being injured, this right not being such as to warrant either one in failing to observe ordinary care and prudence.⁸

9. *Concurrent negligence.* If you should find that both plaintiff and defendant were negligent in failing to observe ordinary care under the circumstances of this case, and that the negligence of both plaintiff and defendant directly contributed to produce the injury, and that the negligence of plaintiff was concurrent in point of time with that of the defendant, the plaintiff can not recover. But if the negligence of the plaintiff, if you find that he was negligent, merely put him in a place of danger, and did not continue until the moment of the injury, and the defendant either knew of his danger, or by the exercise

⁸ Berry Autos, sec. 128; Buscher v. Transp. Co., 106 N. Y. App. Div. 493; Hennessey v. Taylor, 189 Mass. 583.

of ordinary diligence he would have known of the danger, then plaintiff's negligence did not concurrently combine with defendant's negligence to produce the injury, and the defendant's negligence in such case would be the proximate cause. But if the plaintiff was guilty of failure to observe ordinary care for his own safety up to and at the very moment of his injury, and the defendant by the exercise of ordinary care could not have observed, and did not learn and know of plaintiff's danger until he was so near the plaintiff that by the exercise of ordinary care he was unable to avoid injuring him, then your verdict should be for the defendant.⁹

⁹ *Fleming v. Lawwell*, Franklin County Com. Pleas, Kinkead, J. As to concurrent negligence, see *Drown v. Traction Co.*, 73 O. S. 230.

Sec. 1524. Driver must anticipate meeting pedestrian at street crossing.

The jury is instructed that it was the duty of the defendant through its servant, in driving the automobile, to have anticipated that he would meet persons at the street crossing involved in this case; he was bound to keep his machine under such reasonable control as would have enabled him to have avoided collision with any one who was also using reasonable and ordinary care and caution in traveling upon or crossing the street. If necessary, to avoid injuring a pedestrian crossing the street who is at the time acting prudently and carefully, the driver of the automobile should slow up, or even stop. But on the other hand, a reasonably prudent driver of an automobile in passing over street crossings when pedestrians are passing across the same, or when persons are passing across the same on a bicycle, may be justified under the particular circumstances of the case in adopting any other precautionary measure than that of slackening the speed or of stopping the car. He may adopt any other precautionary measure which would have been pursued by ordinarily prudent and careful drivers of such machines under the particular circumstances as shown in this case.¹

¹ *Teverousky v. The Cols. Garage & Mch. Co.*, Franklin Co. Com. Pl., Kinkead, J.

Sec. 1525. Duty of driver to give signal at street crossing, and to adopt other precautions.

While it is the duty of drivers of automobiles to blow their horns or give other signal on approaching street crossings, such as are customarily used in propelling automobiles, still even the giving of such signal alone may not be sufficient, under all circumstances, without adopting other precautionary measures to avoid injury, such as are deemed reasonably necessary, and such as are usually pursued by prudent persons under such circumstances, such as slackening the speed, stopping, or turning his machine so as to avoid the collision.

It is for the jury to say whether or not the defendant here, under the circumstances of this case, did adopt any precautionary measures reasonably calculated to avoid the collision with the plaintiff. If he did, the defendant should be held blameless, if he did not, he should be held to be at fault. The true test always is that the driver of an automobile at street crossings must observe the care and caution which careful and prudent drivers of motor vehicles would have exercised under the particular circumstances, the question in this case being for the jury.¹

¹ *Teverousky v. Cols. Garage, etc., Co., Franklin Co. Com. Pl., Kinkad, J.*

Sec. 1526. Duties of drivers as to speed—The statute.

One of the charges of negligence in this case is that the defendant operated its car at an unlawful rate of speed, to-wit, at the rate of about eighteen miles per hour.

The general code of this state provides that no person shall operate a motor vehicle on the public roads or highways at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person, nor at a greater speed than eight miles an hour in the business and closely built up portions of a municipality, nor more than fifteen miles an hour in other portions thereof, or more than twenty miles an hour outside of a municipality.¹

¹ G. Code, secs. 12603, 12604.

Sec. 1527. Same—Violation of statute *prima facie* negligence—Not conclusive.

It is the law that violation of a statute of the state constitutes *prima facie negligence*. That means simply that proof of the violation of a statute of the running of an automobile at a greater rate of speed in a municipality than is provided by statute shall be considered as *prima facie* proof of negligence; but it is not conclusive; if the jury are of the opinion that in this particular case under all the circumstances, that the defendant ran the machine at a greater rate of speed that is provided by law, you are not required to consider that fact as conclusive of the negligence on the part of the defendant, because the fact of negligence is within the exclusive province of the jury to determine in the light of all of the evidence and in the light of the standard of duty fixed by the statute as applicable to the peculiar circumstances of this case. If the jury is of the opinion that the evidence in this case has overcome or rebutted the *prima facie* case made out under the statute, and find that under all the circumstances that the defendant was not negligent in the operation of the car, you are permitted under the law to arrive at such conclusion notwithstanding the statutory standard of duty. The mere rate of speed, whether high or low, lawful or unlawful, is immaterial unless it entered into the injury and was the efficient cause thereof.¹

¹ *Teverousky v. Cols. Garage, etc., Co., Franklin Co. Com. Pl., Kinkad, J.*
See *Berry Autos*, sec. 164.

Sec. 1528. Duties of drivers in meeting others driving in the street—Reasonable look-out—Control of machine.

An automobile has the same duties to perform when meeting others driving in the streets (or pedestrians) as drivers of other vehicles in the streets of a city. No matter at what rate of speed the driver of an automobile may be running, whether within or beyond the law, he still is bound to observe ordinary care to anticipate that he may meet persons at any point in a

public street, and especially at a street crossing, and he is bound to keep a reasonable lookout, and to keep his machine under such reasonable and ordinary control as would enable him to avoid a collision with another person using reasonable care and prudence in crossing the street. The fact whether or not the defendant did or did not run and operate its car at a greater rate of speed than was reasonable under the circumstances, is to be taken into consideration, together with all the other evidence offered in the case showing what the defendant did or did not do, and what the plaintiff did or did not do, in determining the question of the efficient cause of the injury to the plaintiff.¹

¹ *Teverousky v. Cols. Garage, etc., Co., Franklin Co. Com. Pl., Kinkad, J.*

Sec. 1529. Driver, keeping lookout, having car under reasonable control, may assume pedestrian will not suddenly turn backward.

When an operator of an automobile has had time to learn or discover, or by the exercise of a proper and ordinary lookout should have realized, learned or discovered that a person whom he is approaching, or whom he meets or is approaching is in a position of disadvantage, and will probably have difficulty to avoid the coming automobile, the operator of the motor vehicle is under such circumstances required to exercise increased exertion to avoid a collision, which, however, is nothing more than ordinary care under the circumstances.

If the defendant acted upon the assumption that the plaintiff was passing a line in the street which defendant was passing, or would pass, if defendant assumed that he would probably pass the point where plaintiff was crossing the street—considering the speed at which he was running his machine—and if defendant was acting prudently and carefully in your opinion, and had sufficient control of his machine, and had reasonable ground to believe that plaintiff would continue her course in crossing southwardly on the street, and if the defendant had reasonable ground to believe that he would be able to pass over the crossing north of the plaintiff without injuring her; and if

the jury are of the opinion from all the evidence that the defendant would have passed the plaintiff had she continued on her course southward, instead of stopping and turning backward and going northward; and if you believe under all the circumstances that defendant was observing ordinary care and prudence in driving the car, and that an ordinarily prudent person in the management of the car under the circumstances of this case would have been justified in acting on the assumption that plaintiff would continue on her course, and that she would not turn backward, and if you believe that the defendant used ordinary care to avoid the collision with plaintiff after he discovered that plaintiff did turn backward, and that by the use of ordinary care and prudence, the defendant was unable to avoid collision with plaintiff, either by turning his car or by stopping the same, then your verdict should be for the defendant.¹

¹ *Teverousky v. Cols. Garage, etc., Co., supra.*

Sec. 1530. Pedestrian going unexpectedly in front of auto.

If a person goes unexpectedly in front of a moving automobile, which is being prudently managed and controlled by the driver, who is unable, by the exercise of ordinary care and prudence, to avoid injuring such person, he is not liable. He is only liable under such circumstances if he fails to observe ordinary care and prudence in the management and control of his car, and by reason of such failure causes the injury.

Sec. 1531. Warnings given pedestrian causing bewilderment.

If the plaintiff was crossing the street without giving any heed or attention whatever to the approaching automobile, and the jury believe and find that without regard to the speed of the automobile at the time, that the plaintiff would have crossed over and across the street in safety had not her attention been suddenly called to the approaching machine, and if the jury are of the opinion and find that the warnings given to her by approaching persons on the street at the time threw her into a

state of bewilderment and that she miscalculated in her efforts to avoid the injury, and that she would have passed on in safety had such warning not been given her, and that the warning so given her of the approaching automobile caused her unexpectedly to step backward so as to place her in front of the machine and that the injury would have occurred in the same way whether the speed of the car was normal and unreasonable, or whether it was excessive, and that the operator of the car was unable by the exercise of ordinary care to avoid colliding with plaintiff after she did step backward, then your verdict must be for the defendant.¹

¹ *Teverousky v. Cols. Garage, etc., Co., Franklin Co. Com. Pl., Kinkead, J.*: 108 Miss. 1: 175 Pa. St. 559.

Sec. 1532. Driver running excessive rate of speed approaching crossing—Gives no signal—Pedestrian placed in sudden danger—Not negligent if injudicious choice made between hazards.

If, however, you find that the defendant was running his machine at a dangerous rate of speed, and if he failed to slow up on approaching the crossing, and if he failed to sound any warning or signal of his approach, and you believe and find that plaintiff without any fault on her part was placed in a situation of danger, and that she was placed in such situation of danger solely through the negligent conduct of the defendant, then and in that event plaintiff is not to be held to the exercise of the same care and circumspection that prudent persons would exercise where no danger is present, and she can not be said to be guilty of negligence if she failed to make the most judicious choice between hazards presented, or would have escaped injury if she had chosen to go differently. The question in such case is not what a careful person would do under ordinary circumstances, but what would she be likely to do or might reasonably be expected to do in the presence of such existing circumstances of peril. Indeed this rule would apply

to the conduct of the defendant in this case making his choice of course to avoid the collision, providing he did not create the peril by his own neglect, but that plaintiff herself by her own fault placed herself in a position of danger.

This question is within the province of and is to be determined by the jury in the light of all the circumstances developed in the evidence. But the jury will understand in considering and determining the cause of the danger and peril in this case, and of the question of the existence of danger and peril and who was responsible for the cause thereof, that you must consider and determine whether such peril was caused by the failure of the defendant to observe ordinary care and prudence in the management and control of the machine, or whether it was due to the failure of the plaintiff to use her senses of sight and hearing, or in acting upon the warning given her by other persons of the approach of the automobile.

The jury will have occasion to apply this rule of care and circumspection to be exercised by the plaintiff in making her choice of action, only in the event that you are of the opinion that her peril was due to the fault or neglect of the defendant. If you find that such peril was due to her own neglect, or was caused by the warnings given her by other persons, then you will have no occasion to consider this question and your verdict should be in such case for the defendant; provided you find under the previous instructions given you to the effect that the defendant would not be liable if you find that plaintiff would not have been injured if she had used her senses of sight and hearing and kept on her forward course, and had not heeded and acted upon the warnings given her by other persons and that defendant could not have avoided the injury to her after he had discovered the plaintiff in a position of peril and had used reasonable care to avoid injuring her.¹

¹ *Teverousky v. The Columbus Garage & Machine Co., Franklin Co. Com. Pl., Kinkead, J.*

Measure of care required of one placed in sudden peril. *Pennsylvania R. R. Co. v. Snyder*, 55 O. S. 342; *Berry Autos*, sec. 157.

Sec. 1533. Automobile lawful means of conveyance—Equality of right between driver and pedestrian—Another form.

The law is that automobiles are a lawful means of conveyance, and they have the same rights in the streets of a city as any other vehicle running thereon; and persons traveling in the streets or driving automobiles in the streets of a city have equal rights. Neither has a superior right. Equality of right in this case required that both the driver of the automobile and the plaintiff in crossing the street should exercise ordinary care under the circumstances of this case. It was the duty of both parties in this case to have exercised their faculties of sight and hearing; plaintiff for passing vehicles or automobiles, for his own protection, and the defendant for persons propelling or riding a bicycle. Both had the right of way, and both were required to be cautious. Both were bound to observe ordinary care to avoid collision. It was the duty of the defendant in driving his automobile to have observed ordinary care, such as would have enabled him to have observed the danger of the plaintiff, if he was in a position of danger, whether the plaintiff was negligent in observing the approaching car as it was passing along the street and approaching the street crossing or not.¹

¹ *Brender v. Parker*, Franklin Co. Com. Pl., Kinhead, J. See *ante*, sec. 1523, note 2.

Sec. 1534. Correlative duties of driver of auto and pedestrian.

A driver of an automobile in the streets of a city must observe, and it was the duty of the defendant to have observed such watchfulness as ordinary care and prudence demands for other persons driving a wheel or propelling a wheel on the street—that is, as to footmen or travelers in the street, by wheels and otherwise; he must have his machine under such reasonable and ordinary control, and must take such steps in the handling thereof as ordinary care and prudence in such

case requires, such as will enable him to avoid injuring others who have equal rights in the street.

It is the duty of drivers of automobiles in the streets of a city to give a signal by blowing the horn or giving other signals at crossings to warn other persons who are about to or who are crossing the street.

Sec. 1535. Ordinance as to passing vehicles and carrying lights—How considered.

Two ordinances have been introduced in evidence in this case; one by the plaintiff touching the manner in which vehicles are required to pass into another street; another touching the obligation of one to carry a light on wheels or bicycles. The violation of these ordinances, if they were violated as claimed in this case, does not, as does the violation of a state statute, constitute *prima facie* evidence of negligence; but the jury may simply consider the rule of conduct prescribed by ordinance as one of the items of evidence reflecting upon the matters complained of, and may give it such consideration, together with all the other evidence in the case, as the jury may deem proper.

The mere violation of the law of the road, as prescribed by ordinance, or by the common law, does not give rise to a *prima facie* case of neglect in such way as to create a liability. The question is whether the violation of such a duty constitutes negligence and whether it did in fact proximately cause the injury. If the jury find that such violation of duty did proximately cause the injury, your finding should be in favor of the plaintiff, provided you find that such violation of duty was the direct, immediate and proximate cause of the injury. But if you should find that such violation of duty did not directly cause the injury, but that notwithstanding such violation of duty by the defendant, the plaintiff himself could have avoided the injury to him by the exercise of ordinary care on his part, then the defendant would not be responsible, and the plaintiff in such case could not recover.

Sec. 1536. Operator of auto may assume persons at street crossing will exercise ordinary care.

An operator of an automobile has a right to assume, and to act upon the assumption, that every person whom he meets in the streets or at street crossings will also exercise ordinary care and caution according to the circumstances, and that others traveling on the street on a wheel or bicycle will not recklessly expose themselves to danger, but will rather make an effort to avoid it. If an operator of an automobile discovers that a person whom he is approaching or whom he meets, or who is approaching in a position of disadvantage and will probably have difficulty in avoiding the coming automobile, the driver of the latter is required to exercise ordinary care under the circumstances to avoid injuring him.

Sec. 1537. Driver of auto and of other vehicle both negligent—Concurrent negligence—Proximate cause.

If the jury find that both plaintiff and defendant were guilty of negligence, and that the negligence of both was contemporaneous and continuing until after the injury, and that the negligence of each was a direct cause of the injury, without which it would not have occurred, the plaintiff may not recover, and your verdict should be for the defendant. But if you find that the negligence of the plaintiff, if he was guilty of negligence was not contemporaneous and continuing, as stated, you will then determine whether the negligence of the plaintiff or that of the defendant was the proximate cause of the injury.

The law regards only the proximate cause, attaching legal consequences thereto, consequently the jury must understand the meaning of the term. Proximate cause of an injury is that cause which is a natural and continuous sequence unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred. Under the rules given you concerning the alleged negligence of both plaintiff and defendant, the jury is instructed that if it should find that the plaintiff was guilty of negligence in any of the particulars

charged, and that the defendant was also guilty of negligence but that the negligence of plaintiff was not contemporaneous and continuing with that of the defendant, and that plaintiff's negligence, without the intervention of the negligent acts of the defendant, would not have produced the injury, and that the negligence of the defendant in such case was a new and independent cause without which the injury would not have occurred, and that the same produced the injury, your verdict should be for the plaintiff. But if you find that the negligence of the plaintiff was not concurrent with that of the defendant, and that there was no intervening new and independent negligence of the defendant producing the injury, but that the negligent acts of the plaintiff produced the injury, your verdict should be for the defendant.¹

¹ *Drown v. Traction Co.*, 73 O. S. 230.

Sec. 1538. Whether driver of auto acting as agent or servant of owner—Or whether person hired it for himself and operating it for himself alone.

It is not claimed that the defendant Mr. M., was in the automobile which collided with the automobile in which the plaintiff was riding. Before the defendant can be held liable in damages it must appear by the greater weight of the evidence, that the driver of the defendant's automobile was at the time of the accident acting as the agent or servant of the defendant, and within the scope of his employment as such agent or servant. If at the time of the collision the driver of the defendant's automobile was not operating the automobile in the service of the defendant, but had in fact hired the automobile from the defendant and was at the time operating it for himself alone, and not as the servant or agent of the defendant, then that will be an end of your deliberations and your verdict must be for the defendant, because if H. B. had hired the automobile from the defendant, and was using it solely for his own use and pleasure at the time of the accident, and not as the agent and servant of the defendant, and for the defendant's use and

benefit, then the plaintiff's right of action is against H. B. and not the defendant in this case. And that is true although M. might have allowed him to hire and use the machine because he knew he could handle it properly. But if you find the fact to be that the driver of the automobile was at the time of the accident acting as the agent and servant of the defendant, and within the scope of his employment by the defendant, you will proceed to inquire whether the driver of the defendant's automobile was guilty of negligence in the running of the defendant's automobile, and whether that negligence was the proximate cause of the collision and consequent injury to the plaintiff. These two vehicles which came in collision both had the same right in the highway at the intersection of these two streets. It was the duty of the driver of each of the vehicles to exercise reasonable and ordinary care to avoid a collision with the other.¹

¹ *Jewett v. Murnan*, Com. Pl. Court, Franklin Co., Bigger, J.

Sec. 1539. Equality of right of street railway and driver of automobile—Relative duties of each—Familiarity of driver with crossing.

It is the law that a street railway company and a person driving an automobile in the streets of the city had equal rights therein. It is sometimes said that neither has the superior right and that their rights are both equal. But this equality of right from the very nature of things can not give them both the right to use and occupy the same part of the street at the same time. And sometimes the one must give way to the other in reason and in sense.

This so-called equality of right has its qualifications and limitations. If it appears that one or the other has obtained an apparent precedent right over the other by actual occupancy and use of a portion of the street, or, if it appears that either party has made the first move in the direction of the use of a street and has made an earlier start toward such use which is apparent to another using ordinary care to observe that fact,

under such circumstances as to make it readily and ordinarily apparent to the other that he, too, can not use that portion of the street in safety, then may it be said that the equality of right is for the moment suspended and the one who, by the use of ordinary care may, or should observe the fact of the prior use, such precedent attempt to make such use by the other one, or acts on his part showing a purpose to proceed to such use under such circumstances showing that such use must for the moment be exclusive, then such other person must yield the use of the street to the one and must not attempt to make use of it himself.

Now, gentlemen, negligence as the term is used in law, is defined in a simple way—one which is easily understood by anyone—as the failure to use such care as ordinarily prudent persons would have used under the same or similar circumstances.

And ordinary care is likewise defined as such care as ordinary persons would use under such circumstances. Then when you undertake to apply those terms to each case, it will be stated that ordinary care as applied to these parties here is such care as a driver of an automobile would have exercised under the same or similar circumstances as appear in this case. And as applied to the defendant company, ordinary care would be such care as an ordinarily prudent motorman would have observed under the same or similar circumstances as appear in this case.

It is the duty of the operative of a car being run by the defendant company to run it at a reasonable rate of speed, and to sound a gong upon the approach of a street crossing, and to use ordinary care to have the car under such reasonable control as would enable the person to either check the speed of the car or, if necessary, upon discovering the danger of a person in the street, even whether that person is acting prudently or not, to stop the car.

On the other hand, it is the duty of a person driving an automobile, on approaching the street crossing, not to stop, look and listen in the commercial railroad sense, but to use his faculties of sight and hearing to observe whether or not there

is a car approaching. As stated to you in the special instructions, he is bound to take into consideration the fact that while the street railway company has not the superior right of way, yet its cars can not move to the right or the left and give way to a pedestrian, or to one in a vehicle as readily and as easily as a driver of an automobile or a pedestrian may give way to the railway company.

And it may also be said that anyone who is familiar with any particular crossing—anyone who is living in a city, and anyone who has frequently gone over a particular crossing, is chargeable in a way with knowledge that he thereby obtains with reference to the characteristics or the nature of that particular crossing, and if there are any surrounding conditions and circumstances that are unlike other crossings, he is bound to take notice of these, and he is bound to keep them in mind and to observe ordinary care for his own safety.

At the same time, a driver of an automobile has the right to act upon the assumption that a driver of a street car will also observe his duties and that he will also observe ordinary care in the management and control of that car, and that he will sound the gong, and that he will run it at a reasonable rate of speed, and the like.¹

¹ *Bates v. The Columbus Ry. & Lt. Co., Franklin Co. Com. Pl., Kinkead, J.*

Sec. 1540. Duty of driver of auto at railroad grade crossing.

The jury is instructed that it is the duty of the driver of an automobile when approaching railroad tracks at a grade crossing, where the vision is obstructed, to stop, look and listen, and to do so at a time and place where stopping and where looking and where listening will be effective. So that it follows that one who drives an automobile over a railroad crossing at grade, without stopping his machine to look and listen at a point where he may obtain a clear view is guilty of neglect.¹

The jury will determine therefore, etc.

¹ *Brommer v. Penn. Co., 179 Fed. 577, 29 L. R. A. (N.S.) 925; N. Y. C., etc., R. Co. v. Maidment, 21 L. R. A. (N.S.) 794, 168 Fed. 21.*

Sec. 1541. Driver of automobile placed in sudden peril through neglect of another.

The jury is instructed that where a driver of an automobile is placed in a position of sudden danger or peril without his fault, but by reason of the neglect of a railway company at a crossing (or street intersection), all that is required of him is that he use ordinary care under the circumstances in acting for his own safety; if he does not select the very wisest course, but makes an honest mistake of judgment in such sudden emergency, such mistake will not constitute negligence on his part, although it may appear from the evidence that another course might have been better and safer.

Whether the plaintiff acted with ordinary care in deciding the course to be taken by him in such sudden peril is for the jury to determine.¹

¹ 46 L. R. A. (N.S.) 708, note; Nicol v. R. & Nav. Co., 71 Wash. 409, 43 L. R. A. (N.S.) 174, 128 Pac. 708; Dickinson v. Erie R. Co., 81 N. J. L. 464, 37 L. R. A. (N.S.) 150; Railroad v. Snyder, 55 O. S. 342.

Sec. 1542. Injury by collision between two automobiles—Plaintiff charges excessive speed—Defendant counterclaims for injury to his machine by same collision.

1. *Statement of claims of plaintiff and defendant.*
2. *Burden of proof.*
3. *Credibility of witnesses—Testimony and evidence distinguished—Ultimate fact to be found.*
4. *Negligence of parties to be determined—Negligence in the use of automobiles in city.*
5. *Duty of driver in approaching street intersection.*
6. *Drivers of automobiles, required to observe law of road.*
7. *Duty as to speed.*
8. *Both parties claiming relief, but one can recover.*
9. *Minor son of defendant driving car, his authority—Liability of father for negligence of son.*

10. *Same continued*—Automobile, though not dangerous instrumentality, still may become so, if recklessly driven —Effect of legislative regulations.
11. *Same continued*—Implied authority by father to son to use and drive auto.
12. *Same continued*—Jury to determine whether negligence of either plaintiff or defendant caused collision.
13. *Same continued*—Contributory negligence and concurrent negligence as applied to case.
14. *Precautionary instruction as to description of speed by witnesses.*
15. *Direction as to verdict.*

1. *Statement of claims of plaintiff and defendant.* The plaintiff brings her action for injury to her automobile, stating that she was driving along State street in——, ——, at about six p. m., and that the defendant drove a certain automobile at a high and reckless speed, at the rate of thirty-five miles an hour, without giving any signal or warning of the approach of the car toward the West State street crossing, southbound on Center street, and that the automobile of the defendant struck that of the plaintiff with great force and violence the right front of plaintiff's automobile, wholly without fault or negligence on the part of the plaintiff.

The petition then describes the injuries which plaintiff claims were done to her machine and claims damages in the sum of \$——.

The attitude of the defendant with reference to that claim is one of complete denial; that is, he denies each and every allegation in the plaintiff's petition contained. That is, he denies that the person in charge of his machine was guilty of any negligence whatever. And then he sets forth a counter-claim in tort, alleging negligence, and claiming damage.

2. *Burden of proof.* The burden of proof is on the plaintiff to establish by a preponderance of the evidence her claims; that is, that the defendant was negligent in the particulars charged, and that such negligence was the sole and proximate cause of

the injury to her machine. The burden is upon her to show that she was without any fault; that she was not guilty of any negligence herself which was a contributing cause to her injury, but that on the contrary, the injury was caused solely and only by the negligence of the defendant. This she must do by a preponderance, or the greater weight of the evidence. That term has been defined to you so many times that you fully understand it without further explanation. You need only to bear in mind that it does not mean the greater number of witnesses but it means the greater weight of the evidence that comes from the mouths of the witnesses on the witness stand.

Now on the other hand, the burden of proof rests upon the defendant to not only show that the injury to his machine was not caused by his own negligence, but that it was caused by the sole and only negligence of the defendant. And this he must establish by the preponderance or the greater weight of the evidence.

3. *Credibility of witnesses—Testimony and evidence distinguished—Ultimate fact to be found.* The credibility of the witnesses must be determined by the jury.

In a conflict of testimony it becomes the province of the jury to weigh and consider what each witness testifies to; consider its probability or its improbability under the circumstances of the case; the opportunity of the witnesses to learn and know the things to which they testify, the attention and location of the witnesses to the matters in question and in dispute; their apparent demeanor on the witness stand, their attitude in giving their testimony, their relations to the parties. You may consider whether or not any of them show bias or partiality or prejudice to either side.

The jury is under no obligation to believe the statements of a witness merely because he has made them, because your province here, gentlemen, is to determine what credence you will give the testimony of witnesses. If you think under all the circumstances developed in the case that any witness has given testimony that seems improbable under all the circumstances, it

is within your province and duty to cast that aside and out of your mind. If you are of the opinion that a witness has given testimony which is false in part and true in part, you will give it due weight accordingly.

Bear in mind, gentlemen, that testimony is what is given by the witnesses from the witness stand; evidence constitutes that which remains in the case after the jury has carefully sifted and weighed the testimony given by the witnesses and has determined its credibility and has determined how much of it you will act upon or receive and consider, and how much of it you will reject. And when you have gone through that process of sifting the evidence and eliminating any part of it that you may deem proper, then it will become your duty to draw from the evidence what we call in law the ultimate fact; that is, the fact to which the law which will be given you by the court is to be applied.

Now the ultimate fact, or the fact which is involved in this case on the plaintiff's side is whether or not the defendant was guilty of a wrongful act, a violation of a duty which was the cause of her injury; whether or not she herself was free from fault. The ultimate fact on the side of the defendant is whether or not his machine was injured by the wrongful act of the plaintiff, and whether or not he was without negligence on his part.

But one of the parties can recover, but the court instructs you as to the law bearing upon the respective claims made by each side so as to enable you to apply it to the evidence in drawing therefrom the ultimate fact, and finally by your verdict to determine what is the ultimate fact. While the court gives you the law, still your verdict in a way is a finding of mixed law and fact.

4. *Negligence of parties to be determined—Negligence in the use of automobiles in a city.* The jury will first determine whether either one or both of the parties were guilty of negligence; whether either one was guilty of negligence will depend upon the duties and obligations which the law imposes upon each one.

Negligence is defined to be the failure of a person to exercise the degree or measure of care required of him by the law under the facts and circumstances of the case presented.

In the use of an automobile in the streets of a city, the person in charge thereof and driving the same is required to use ordinary care in the management and control of the same to avoid injury by collision to and with another machine which is being driven in the street at the same time.

The ordinary care required is such care as persons of ordinary care use and observe in the driving, management and control of an automobile under similar circumstances and conditions to those which are disclosed by the evidence in this case.

This measure of care contemplates taking into consideration the nature and character of the machine, its ordinary use, the ordinary manner of driving and controlling it so as to avoid collision with other autos being driven in the streets, at street intersections.

5. *Duty of driver in approaching street intersection.* Each person who is driving an auto in approaching a street crossing and intersection, at and over the same, is bound to observe the laws of speed as regulated by statute, and is required to be on the lookout for other automobiles which may be driven on the other street which intersects with the one on which he is driving; such person is bound to observe ordinary care by keeping his machine under reasonable control so as to avoid collision with another auto which may be passing over such street intersection at or about the same time.

The rule requiring drivers of autos in approaching street crossings or intersections to have the same under reasonable control so as to guard against collision with other autos as stated applies to both parties in this case. The driver of an automobile must exercise his rights in driving in the streets with a due regard for others using the streets in the same locality.¹

6. *Drivers of autos required to observe law of the road.* Another duty and obligation required of drivers of autos,

and which is and was applicable to both parties in this case, is that they shall observe the law of the road. The law of the road is fixed by statute in this case.² It requires drivers of vehicles, which embraces automobiles, to keep to the right so as to leave one-half of the road free. It also requires drivers of automobiles on meeting another automobile, to keep to the right so as to leave two-thirds of the road free. The violation of the statute fixing the rule of conduct concerning "the law of the road," constitutes a *prima facie* case of liability, but it is not conclusive; it is of course rebuttable.

The violation of the law of the road as thus stated to constitute actionable negligence, that is, to give cause for legal redress, must be shown by the evidence to have been a direct or proximate cause of the injury complained of. The mere violation of the law of the road which has nothing to do with the cause of the injury will not give rise to legal liability.³

7. *Duties as to speed.* I read to you now, gentlemen, in substance, the two statutes that regulate the matter of speed, which constitutes the law of Ohio on that subject.

One provides ⁴ that a person who operates a motor vehicle on the public roads or highways at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of such road or highway, or so as to endanger the property, life or limb of any person, is guilty of a misdemeanor.

The other one ⁵ provides that whoever operates a motor vehicle at a greater speed than eight miles an hour in the business and closely built up portions of a municipality, or more than fifteen miles an hour in other portions thereof, shall be guilty of a misdemeanor.

¹ *Hennigan v. Wright*, 5 Pennew. Del. Rep. 537; *Christy v. Elliott*, 216 Ill. 31, 108 Am. St. 196; *McIntire v. Orner*, 166 Ind. 57, 117 Am. St. 359.

² Gen. Code, sec. 6310.

³ Violation of the law of road is evidence of negligence, but not conclusive. *Newcomb v. Boston Prot. Dept.*, 146 Mass. 600. See *Babbitt Motor Vehicles*, secs. 248, 939b.

⁴ Gen. Code, sec. 12603.

⁵ Gen. Code, sec. 12604.

These two provisions apply to the driving of an automobile in the streets of a city, because the highways apply alike to streets and country roads. It is to be observed, and the jury will keep in mind in considering the evidence, and deducing therefrom the ultimate fact relating to the conduct of the parties, the fact that the rule of conduct which the Legislature has prescribed as applicable to the speed of automobiles, is that no person shall drive at a greater speed than is reasonable or proper, and that in driving such vehicles the driver must take into consideration the width of the streets, the traffic therein, as well as the "law of the road" so-called. You will observe that the statute makes a separate injunction that one shall not drive an auto so as to endanger the property of another.

In addition to the foregoing specific injunction as to the conduct of parties driving such vehicles is the statute as to speed which forbids driving at a greater rate than eight miles an hour in the business and closely built up portions of a city, and not more than fifteen miles in other portions.

It is a rule of law that because such a rule of conduct as that just mentioned is prescribed by a legislative enactment, it is to be regarded as a standard of duty which is binding on everybody, and especially is a rule of conduct which courts, and that means court and jury, must apply and follow. Therefore, the rule is that proof of the violation of statutory rules of conduct, such as the above, constitutes what is termed in law a *prima facie* liability. That is, in the absence of proof to the contrary, case would be entitled to recover.

In this case the so-called *prima facie* case, if any there is in favor of either party, and that is for the jury to determine, is disputed. Hence, without regard to the effect of the *prima facie* case rule, the jury must look to all the facts and circumstances and determine therefrom the ultimate fact; that is, what rate of speed either or both the parties were going. Whether it was excessive, and if so, whether the fact that either one or both of such machines was being driven at an unreasonable or improper or excessive speed, or so as to endanger property, was a direct

or proximate cause of either injury complained of by either party.

You will determine whether the failure of duty, if there was a failure of duty, on the part of either party was the direct cause of injury, or whether the injury was caused by the failure to have the cars under reasonable control, or because there was a violation of the law of the road.

The court has now stated the law and the rules of conduct required of both plaintiff and defendant in this case, which you are to apply in your deductions of the facts from the evidence, in order to place the responsibility, if any there is, on either party, according to the law and the evidence.

8. *Both parties claiming relief—But one can recover.* As both parties are claiming relief, that is, as each one is asserting a cause of action in tort against the other, it follows that only one can recover, if either has the right to recover at all under the law and evidence.

Plaintiff can not recover if she herself, through her agents, was guilty of negligence directly contributing to the injury to her car.

Nor can the defendant recover against plaintiff if his son, who was driving the car, was negligent, and if defendant became responsible for his conduct by implication or otherwise, as shown by the facts and circumstances as disclosed by the evidence.

9. *Minor son of defendant driving car—His authority—Liability of father for negligence of his son.* The court will now instruct the jury concerning the relation of the son of defendant to himself—that is to the defendant.

As to the relation between defendant and his son who was driving his machine, the ordinary rule of law is that a father is not liable for the independent tort of his son, unless the son sustains the relation of agent to his father concerning the particular service or act involved and under investigation.

The natural tie of relation between father and son does not of itself give rise to, or create the relation of agency, or of master and servant between them. There must be something more than that in order to show that a son is authorized to

drive an automobile under circumstances such as may appear in this case.

Nor can the inference of agency be drawn from the mere fact that the son had possession of the machine and was driving it at the time in question.

The owner of an automobile is not liable for an injury resulting from the negligent operation of the machine by his son unless the father either had knowledge of the possession and operation of the machine by the son, or unless the father had given his consent expressly or impliedly that his son may drive the machine for the use and benefit of his family as well as for the use and benefit of the son himself.⁶

10. *Same continued—Automobile, though not dangerous instrumentality, still may become so, if recklessly driven—Effect of legislative regulations.* While an automobile is a lawful means of conveyance in streets and highways; and while it is not a dangerous device in the common-law sense, that is, like a firearm or other dangerous agency, inherently dangerous, and being an ordinary vehicle of pleasure and business,⁷ still by reason of its power and weight it may become so if carelessly or recklessly driven and managed. Because of the fact that the legislature in the interest of public safety has seen fit to prescribe rules as to speed and other regulations for the protection of persons and property, prescribing criminal penalties for violations, it is incumbent upon courts in adjusting rights and liabilities on the civil side as between parties to adopt and apply rules of conduct looking to the safety of life and property. It would seem from the provisions of the law concerning the conduct and management of automobiles that they have been put in a class of agencies which, though not inherently dangerous, that still they may become so unless they are operated and managed with reasonable care commensurate with the dangers incident to their running at places in a municipality where

⁶ Reynolds v. Buck, 127 Iowa, 601; Maher v. Benedict, 108 N. Y. Supp. 228; Smith v. Davenport, 45 Kan. 423, 23 Am. St. 737; Babbitt Motor Vehicle, sec. 551.

⁷ Cunningham v. Castle, 127 N. Y. App. Div. 580, 111 N. Y. Supp. 1057.

caution and prudence is required to avoid danger to persons and property.

11. *Same continued—Implied authority by father to son to use and drive auto.* The court is of the opinion that the ordinary rule of master and servant, which relation may exist between parent and child, where the former gives express orders to do a particular thing, will not apply in all its force to the facts and circumstances as they may be developed in this case. And the court now therefore, instructs the jury that where a parent purchases an automobile for the pleasure and use of his family and the members thereof, and where from the conduct, acts, statements and declarations of such parent touching the use of such machine, a purpose or intent on his part may be inferred to authorize his minor child to use and drive such automobile for the use and pleasure of himself, that is, the parent, and also of such minor child or of any member of his family, then in such case the jury may infer if it deems proper under the circumstances, and find that such parent impliedly consented that his minor child had authority to use and drive such machine without previous express authority being given in any particular instance. If under such circumstances, the father keeps such automobile at or near his home, and under his control, where his minor child has free access to it, and if such minor child resides with, and is under the control of the parent, and if the implication of authority to his child, if there is any, to use the auto is warranted by the circumstances and conditions, in the opinion of the jury, it is then the duty of such parent to adopt reasonable precautions against an improper use of his machine by his minor child.⁸

Hence it follows, gentlemen, from this statement of the rule of duty which the court adopts for the direction and guidance of the jury in this case, that if you conclude and find that the

⁸ This portion is an innovation; it is not in accord with the rule of liability as usually stated which holds the father liable only when the son is acting as the agent of the father. It is thought that the father ought to be held where the son runs an auto under implied authority, recklessly and carelessly.

son of the defendant had implied authority from his father to take and use his machine for his, the son's, individual use and benefit, and that such son was guilty of negligence in the management and running of the car at the time in question, the defendant would in law be responsible for his acts, whether he had knowledge of the fact that his son was so running the car at the time or not.

But if on the other hand, there is no warrant under the facts and circumstances disclosed by the evidence in the opinion of the jury for the inference of implied authority from defendant to his son to so use the car, or if, on the contrary, defendant had given express directions to his son not to take out or use the machine for his individual use and benefit without the consent of his father, in such case the defendant would not be responsible for any negligence of his son, on the occasion of the injury complained of, if he was guilty of negligence.

If such should be the conclusion and finding of the jury on the question of authority or agency of the son, that would end your deliberations so far as the right of plaintiff to recover against the defendant, because in such case she could not recover unless there was such implied authority given by the defendant to his son.

12. *Same continued—Jury to determine whether negligence of either plaintiff or defendant caused collision.* The court has now stated all the rules of law applicable to the respective claims of the parties. The jury will bear in mind that the court states the law applicable to the claims made by plaintiff as to speed, and the evidence offered in support thereof, and also to the claim of defendant concerning the negligence charged against the plaintiff.

You will sift the testimony, select what you deem worthy of credence and belief, and deduce therefrom by the aid of the law given you by the court, the ultimate fact as to whether plaintiff was free from negligence, and defendant was negligent, or whether defendant was not negligent and the plaintiff was guilty of negligence. In other words, you are to search for and determine what was the proximate cause of the collision and injury.

Was it, as claimed, due solely and alone to excessive speed of the defendant, or was it due solely and alone to negligence of the plaintiff by running on the wrong side of the street, or in failure to use his senses in discovering the danger of the collision, and in failing to adopt reasonable care and means to stop his car to avoid collision?

You may, if the evidence so warrants, in your opinion, base your conclusion on matters other than the fact as to which car ran into the other. The question is whose fault was it that the two cars collided. It was the duty of each to avoid collision, whether either or both was careless or negligent, that is, conceding for the sake of illustration that one or the other was guilty of negligence. Notwithstanding that fact, it was the duty of the one who may not have been negligent to have observed ordinary care for his own safety after having discovered the negligence of the other party, or one who should have discovered it by the exercise of prudence and care.

If defendant was running at an excessive rate of speed, and plaintiff saw or could have seen the car of the defendant in time, it was her duty, by the exercise of ordinary care and the means at hand to stop her car, and, if she failed to do so, plaintiff can not in such case recover. She can only recover, provided she was not at fault or did not contribute to her own injury, if the defendant ran at an excessive rate of speed and that was the cause of the injury.

Defendant can only recover if being without contributory fault, the plaintiff negligently ran into his machine.

Neither may recover if either was guilty of contributory negligence, or if both were guilty of concurrent negligence.

13. *Same continued*—*Contributory negligence and concurrent negligence as applied to case.* Contributory negligence is negligence on the part of one claiming relief against another, where both are guilty of some negligence, but the contributory negligence of the complainant is nearer in point of time or of cause and effect in producing the injury. That is, it causes the injury and defeats recovery. So contributory negligence on the part of either will defeat their recovery. Concurrent negligence

as I mentioned the term a while ago, which will bar recovery, may be put, and is put by the law in this state in the following language: If both the plaintiff and the defendant were negligent, and the negligence of both directly contributed to produce the injury, neither the plaintiff nor the defendant has any right to recover, and you should in such case, render a verdict against both parties.⁹

14. *Precautionary instruction as to description of speed by witnesses.* The court gives you a precautionary instruction concerning the description by the witnesses as to the rate of speed. Concerning the rate of speed, you are permitted to enter the realm of probabilities, that is, the jury deals in probabilities. Absolute certainty is not always expected, nor is it always possible. But the jury is not permitted to enter into the field of speculation in arriving at your verdict. In arriving at your verdict you must be governed by the testimony and not by any speculation or conjecture of your own.

Witnesses, expert and non-expert, may express their views and opinions for the consideration by the jury. These you may weigh carefully in the light of all the conditions and circumstances disclosed by the evidence. You will consider the view point of the witness, his opportunity to judge of the speed, his relations to the parties, or his interest, if any. You should consider whether the witness was specially attentive or indifferently attentive, whether it was guess or conjecture, or an opinion expressed by a person of average intelligence in a position to form a reasonable estimate of speed.¹⁰

In this connection bear in mind the statutes which the court read to you which both fixes the maximum rate of speed beyond which persons are not permitted to go, and also provides that a motor vehicle shall not be operated at a greater rate of speed than is reasonable or proper.

15. *Direction as to verdict.* Now, gentlemen, the court has stated the rules of law for your guidance and application. I now finally charge you as to the verdict which you may render

⁹ As to concurrent negligence, *Drown v. Traction Co.*, 73 O. S. 230.

¹⁰ *Nicholson v. Traction Co.*, 14 N. P. (N.S.) 187-8.

or may not render, according as you may find the facts to be. This may serve to clear any misunderstanding that you may have from the perplexities of the questions and the law.

First. If you find plaintiff not guilty of negligence proximately causing the injury to her machine but find defendant guilty of negligence which was the sole cause of plaintiff's injury, then your verdict should be for the plaintiff, and in such case you should assess her such damages as you will find from the evidence will reasonably compensate her for the injury sustained.

Second. If you find defendant not guilty of negligence proximately causing injury to him, but find plaintiff guilty of negligence which directly caused the injury to the defendant, your verdict will be for the defendant, and you should in such case assess him such damages as will reasonably compensate him for the injury by him sustained.

Third. But if you find that both plaintiff and defendant were guilty of negligence which directly contributed to the injury which each sustained, then your verdict will be against both of them. These forms of verdict will be placed in your hands.¹¹

¹¹ Park v. Smith, Franklin Co. Com. Pl., Kinkad, J.

Sec. 1543. Injury to passenger in automobile, the guest of one who hires from owner who furnishes chauffeur to drive—Liability depending upon contract of hiring, as well as upon whether driver is engaged in the service and business of the owner.¹

1. *Under general denial plaintiff bound to prove use of machine by hirer within bailment of hiring, as also*

¹ McCatham v. Columbus Transfer Co., Franklin Co. Com. Pl., Kinkad, J.

The machine was hired to go to Urbana and return to Columbus; on the return the machine was kept out by one of the parties concerned in the hiring, who gathered up a party of men and women, who visited wine rooms, taking liquors with them in the machine. No report to the garage was made after return from Urbana, though the machine was driven to the place of defendant to obtain gasoline late in the evening, but the evidence did not directly show that knowledge of this fact was brought to defendant.

3. *Plaintiff must show chauffeur to have been within the business of owner.*
4. *Intoxication of passengers, and chauffeur—Presence of liquors in car at time of wreck—Contributory negligence of plaintiff in use of liquors, so as to be unable to use ordinary care—Circumstantial evidence—Inferences.*
5. *Evidence that chauffeur permitted another to drive car at time of injury, and as to intoxication, consisting of declarations as part of res gestae.*
6. *Scope of employment and service of chauffeur, to be determined by contract of hiring.*
7. *Assessment of damages—Fair and reasonable compensation to both defendant and plaintiff.*

1. *Under general denial plaintiff bound to prove use of machine by hirer within bailment of hiring, as also that chauffeur was engaged in service and business of master.* The general denial made by defendant to the plaintiff's petition, denies the claim that the contract of hiring embraced the trip on which the injury occurred, as well as the claim of the plaintiff that the chauffeur of defendant was driving the car at the time of the injury, or if he was driving it, that he was engaged in the business of the defendant.

The burden is thereby cast upon plaintiff to establish the fact that the automobile was being run and operated by the chauffeur of defendant, either within the terms and conditions of the contract of hiring thereof, by express authority, or by and under the implied authority and consent of defendant by proof of facts and circumstances disclosing such authority, as well as the fact that the chauffeur was engaged in the service and business of the defendant.

The court charges you that where an owner of an automobile hires the same to another, and furnishes a chauffeur whom it has in its employ whose duty it is in such service to drive its

well as the fact that the chauffeur was engaged in the service and business of the defendant.

The court charges you that where an owner of an automobile hires the same to another, and furnishes a chauffeur whom it has in its employ whose duty it is in such service to drive its (his) machines for persons hiring the same, and such chauffeur is driving such car with either the express or implied authority and consent, and he is guilty of negligence in operating the car causing injury, such facts, if proven raise a presumption of, or *prima facie*, liability on the part of the defendant in the absence of evidence to the contrary.²

² White Oak Coal Co. v. Rivoux, 88 O. S. 31.

But the rule of burden of proof is, that though plaintiff may, when making out his (her) case, be content with merely producing sufficient evidence to show a *prima facie* case of liability, still if defendant in its (his) defense produces evidence sufficient to countervail the presumption or *prima facie* case—that is, if the evidence of defendant is of equal or of greater weight—the burden still rests upon plaintiff to produce evidence of greater weight than that introduced by the defendant, because the law requires her (him) on the whole case to establish, by a preponderance of the evidence, the fact that the chauffeur of the defendant was driving the car at the time of the injury.³

³ Klunk v. Railway, 74 O. S. 125.

2. *Credibility of witnesses—What to be considered—Men and women on “joy ride” using intoxicating liquors.* In deciding the question of credibility, which is the sole province of the jury, you will take into consideration all the facts and circumstances surrounding the case. You are not bound to take the statement of a witness merely, because he or she may have made the same from the witness stand. You may disbelieve all or part of what a witness might state, as you may decide. It will be your province and duty to weigh all of the statements of the witnesses in the light of all the facts and circumstances developed by the evidence; to consider the reasonableness thereof in connection

with all the facts, the probability of their truth, or the improbability of the truth thereof; the demeanor and conduct of the witness or witnesses while upon the stand; you will consider whether or not any of the witnesses have shown any reticence in giving the testimony; whether there has been a disposition to withhold something material; and if so what effect it should have upon the credibility of their statements. You may consider whether any of the witnesses have been frank, open and apparently sincere, or whether they have been otherwise, not frank, open and not apparently sincere and truthful. You have the right, and it is your duty, to consider all of the conduct of all the parties who were present and concerned in this automobile incident; you may consider, if you deem proper, the motives, objects and purposes which any of them had in the automobile trip which they were making, whether it would have a tendency to affect the credibility. You may consider also all of the evidence relating to the question of whether or not the parties who have testified and who may have been in the automobile trip had been engaged in the drinking of intoxicating liquors, and whether or not in your judgment it had anything to do with their credibility in the statements given by any of them from the witness stand. You may consider whether or not there was any reason under all the circumstances for withholding anything relating to this trip or to the conduct of any of the witnesses who were involved therein and who have given testimony, or whether or not there was any lack of motive to withhold anything as to which may have been inquired of while upon the witness stand.

And when you have considered all of the statements given by the witnesses from the witness stand and have determined upon what you will believe and what you will disbelieve, if anything, you will then deduce from the testimony which you shall finally decide to be credible and worthy of belief and by the application of the rules of law given you by the court for your instruction and guidance, you will deduce, as I say, from the evidence the ultimate facts which are involved and in controversy in this case.

3. *Plaintiff must show chauffeur to have been within the business of owner.* Ownership of an automobile alone is not in any sense to be taken as evidence of agency. The burden is upon the one complaining of personal injuries resulting from negligence in the operation of a machine, to show not only the fact that the person driving the car at the time was the servant of the owner, but the person complaining is bound also to prove the further fact that such driver was at the time of the accident engaged in the master's business either with the master's express knowledge and consent, or with the master's implied consent, which may be derived from the facts and circumstances of the particular case; and this question must be decided by the jury from the evidence in this case.

The test of the master's liability for the act of a servant is whether such servant was acting at the time of an injury complained of, either within the scope of the employment, or within the line of the service and business of the master.⁴ The term "in the course or scope of employment or authority" means while the servant is engaged in the particular service of the master, and employment, or under particular authority.⁵ That is, it refers to the fact that the servant is engaged in the service of the master, or while he is about the master's business. It does not necessarily mean during the period covered by the employment, but has reference to the act of being engaged in the service and business of the master. And if during the period of time which may be covered by the employment of a servant by a master, the servant steps aside from the line of the business of the master and departs from the line of service, although he is still within the employment of the master, such departure from the line of service at a particular time by the servant will relieve the master from responsibility for the acts of neglect on the part of his servant at the time when he is so acting outside of and beyond the line of the business of the master, and without and beyond the line of the service of his master.

For any acts done by a servant for his master which may in any sense be warranted by the implied authority and which may

be reasonably drawn from any fact or circumstances appearing in the evidence, if any there may be, which relates to and has to do with the particular acts of a servant which are complained of by a party litigant as being negligent, and from which it may be reasonably inferred that such acts are within the implied authority given by the master, the latter may be held responsible for the consequences of the acts of the servant.

Now, gentlemen, applying the rules of law touching the claims made by the plaintiff, if you find that H. was still rightfully using the machine under a contract of hiring, and that it was being driven by the chauffeur and servant of the defendant at the time of the injury, and that such servant was at such time of the injury driving the car at an unlawful rate of speed and such unlawful and negligent rate of speed was the direct and proximate cause of the injury to plaintiff, then in such case the defendant is responsible for the acts and negligence of the chauffeur, and your verdict should in such case be for the plaintiff, and she will be entitled to recover reasonable compensation in damages for the injury sustained by her.

⁴ The charge that was given in *White Oak Coal Co. v. Rivoux*, *supra*, was to the effect that when ownership, and the fact that the driver was in defendant's employ, the burden was on the defendant to show that the accident happened outside the scope of the employment. This was held error.

⁵ *Babbitt Motor Vehicles*, sec. 537; *Slater v. Advance Thresher Co.*, 97 Minn. 305.

4. *Intoxication of passengers and chauffeur—Presence of liquors in car at time of wreck—Contributory negligence of plaintiff in use of liquors, so as to be unable to use ordinary care—Circumstantial evidence—Inferences.* Some evidence, however, has been introduced touching the conduct of all the parties who were passengers in the car as to the drinking of intoxicating liquors. It is alleged by plaintiff in her petition that the chauffeur of the defendant was incapacitated by intoxication from driving the car, and evidence has been offered as to intoxicating liquors being found in the wreck of the machine, as well as of declarations of persons involved in the transaction as to intoxication of the persons connected therewith.

This evidence may be considered by the jury not only in respect to the liability of the defendant, but also as affecting the right of plaintiff to recover, as well as reflecting upon the credibility of the witnesses. The evidence touching this matter may consist in part of direct evidence as well as of circumstantial evidence. Circumstantial evidence consists of inferences drawn from the proven facts. The jury may make such inferences from the presence of the intoxicating liquors in the machine and in possession of the party, as well as from the manner of driving of the machine, and from the nature and character of the accident as it may deem and consider to be warranted therefrom. The jury may also make such inferences from the conduct of each and all of the parties in visiting places where intoxicating liquors are sold as you may deem proper and reasonable.

The court charges the jury that persons who go out upon rides such as was taken by plaintiff and the other persons in the automobile on this occasion, are bound, and this plaintiff was bound to be prudent and careful in the use of intoxicants so that they will not become under the influence thereof, so that they may not be unable on account of the use of such intoxicants to exercise ordinary care for their own safety under the circumstances. It is also incumbent upon such persons under such circumstances that they shall use reasonable care and precaution for their own protection and safety, and this plaintiff was bound so far as she reasonably could under all the circumstances to use reasonable care and precaution for her own safety. Such persons are bound to observe ordinary care to see that their conduct in visiting a saloon and drinking intoxicants and in carrying intoxicating liquors in the machine, shall not thereby contribute to the use of liquor by and the intoxication of the chauffeur. And this duty and obligation was imposed upon the plaintiff in this case under all the circumstances in the case.

If the jury believe and find from the evidence and the circumstances in this case, that the conduct of the plaintiff and her companions in respect to the use of intoxicating liquors

can not be chargeable with any such conduct, if any there was, of any other member of the party, in the matter of contributing to the intoxication of the chauffeur, if he was so intoxicated.

5. *Evidence that chauffeur permitted another to drive car at time of injury and as to intoxication, consisting of declarations as part of res gestae.* It is claimed in evidence that at the time of the injury that some person in the party, other than the chauffeur and servant of the plaintiff, was driving the automobile at that time. The testimony touching this matter is conflicting, consisting in part of direct testimony of parties who were in the machine, and in part of testimony of other persons having no connection with the occurrence as to declarations alleged to have been made by the persons who were in the machine at the time of the injury, which were made soon after the wreck, as well as of a person involved in the transaction alleged to have been made soon after he had regained consciousness. This evidence as to the alleged declarations of the parties so concerned and involved in the transaction were admitted by the court because of their being considered in law to have been part of the *res gestae*, that is, part of the transaction, part of the act of driving the machine over the embankment. Such testimony was admitted under the law upon the theory that if such declarations were made, they were made in such immediate connection with the wreck, and were made under the influences of the same without time for reflection, and were so concomitant with the principal act and so connected with it as to be regarded as the result and consequence of motives or conduct as part of the principal act or transaction under investigation. These are the reasons in law making such alleged declarations competent as evidence, but whether they were made, and the weight and effect to be given the same, if made, is within the province of the jury to determine.

With these instructions you will consider all of the evidence on this point; you will consider the question of credibility of those giving testimony on this matter, their interest or want of interest in that to which they have testified; you will consider

whether the person who was driving probably did not know the road, or whether he was acquainted with it, and determine the fact whether some one of the party other than the chauffeur was driving the machine at the time of the injury.

6. *Scope of employment and service of chauffeur to be determined by contract of hiring.* The scope of the employment and the line of service of such servant or chauffeur is to be determined by the jury, with reference to the nature and extent of the contract of hiring of the machine which the jury may find to have been in this case.

To aid you in determining the questions, the court instructs the jury that the bailment is a contract made and entered into between the parties, one of whom is hiring an automobile and the other in letting the same. If the facts and circumstances relating to the hiring show that the automobile in this case was hired by H. or by H. and G. jointly, for a special trip on a particular business and to a particular place and return, and if their conduct or their statements and any directions which they or either of them may have given to the driver as to the disposition and return of the machine so hired, will, in the opinion and judgment of the jury, warrant the inference and conclusion that the bailment, or the contract of hiring was to end at a particular time, then it must be concluded by the jury that the contract of bailment or of hiring that may have been entered into by the parties of the automobile in question, was to end at such time as the jury may find the fact to be from the evidence. The particular question presented in this case by the evidence with reference to the contract of hiring of the automobile which the jury must decide is, whether the persons who hired this machine from the defendant hired it to go to Urbana and return, and whether such contract of hiring ended when they returned to Columbus; or whether there are any facts or circumstances in connection with the hiring and use of the machine by the parties in this case such as to warrant the implied authority and consent on the part of the defendant that such machine should be used by H. at the time of the injury complained of.

The jury will carefully look to and consider all the evidence bearing upon this point. Consider what was said and done at the time of the hiring; consider what either G. or H. said or did when they returned to Columbus with reference to what was to be done with the car; consider all the testimony given by these two persons on the witness stand; consider the conduct and acts of the chauffeur, when he drove to the place of business of the defendant; consider whether his conduct was such as to give notice to the defendant of his presence there, and of his purpose and intent as to the further driving of the car; and determine the fact whether H. was using the car in pursuance of the original hiring, or whether such further use of the same, under the conditions and circumstances was reasonably and properly chargeable to the knowledge of the defendant.

If the jury finds that H. and G. by their conduct and declarations of either one or both of them, and from the conduct and statements of the chauffeur, indicated that they had completed their contract of hiring of the automobile when they returned to Columbus, if the jury finds that such contract did so end at that time, and that the chauffeur or driver was given to understand or was directed that they did not further desire to use the machine, or if it appears from the evidence that the chauffeur was directed by H. to go to the barn and report, but that instead of doing so, the jury finds that the chauffeur himself voluntarily offered to drive H. to another place in the city of Columbus before going to or returning to the barn, the jury would in such case be warranted in finding that the contract of bailment and of hiring such automobile ended at the time of their return to Columbus, or at the time when by their conduct and their declarations they indicated that such contract was ended or completed, if the jury finds that their conduct and declarations did so indicate.

If the jury should find that the contract of hiring did so end at that time and that the chauffeur was directed by H. to take the machine to the barn, and that, instead of doing so, such chauffeur and driver of his own accord voluntarily drove H. out to another

place; and if H. accepted such service and allowed the driver to keep such machine at that place, and to further continue driving the same for his use and benefit, then in such case the chauffeur departed from the line of his service and was then no longer acting within the scope of his employment or within the line of service of his master.⁷ And if in such case H., after having been requested to return it to the barn, and if H. assumed to direct what further use should be made of the machine from that time on up until the accident, and the chauffeur consented thereto, and drove and managed the same in obedience to the request and directions of H., and did not report to the defendant, and the defendant did not know of such use of his machine, and did not give its consent expressly or impliedly to such use by H. or by its servant, the chauffeur, then in such case the defendant can not be held responsible for any negligence of the driver of the automobile during any period of time when he was driving the car contrary to the contract of hiring, or outside of and beyond the scope of the service and business of the defendant. If such be the finding of the jury as to the contract of hiring and the conduct of the chauffeur, then the jury is instructed that the plaintiff became and was the guest of H., and in such case the liability for the negligence of the chauffeur or of the person who may have been driving the car at the time of the injury rests upon H., and not upon the defendant. In such case who was driving the car is immaterial for the reasons stated.

7. *Assessment of damages—Fair and reasonable compensation—To both defendant and plaintiff.* A philosopher once was asked the question, "How shall injury be repaid?" His answer was, "Injury shall be repaid with justice." If that justice, according to the law and facts, demands the award of damages, then damages shall be awarded. If justice demands that damages shall not be awarded, then no damages may be awarded. Remember that every person, corporation or individual stands equal before the law. Both are entitled to a square deal.

If under these instructions and upon the facts as you shall find them to be, you find in favor of the plaintiff, you will award

her such compensation as you believe and find the nature and extent of the injury sustained by her to demand and justify. Her claims in this respect have been stated to you and need not be repeated here. It will include pain and suffering and the time covered by the period during which she may have suffered or will suffer.

You are admonished that in the assessment of the damages, you are to be guided and controlled by the evidence. It is from the evidence that you must determine the nature and extent of the injuries, and this includes the medical expert testimony. You must not permit yourselves to be controlled and governed by your individual notions irrespective of the evidence. The idea in compensating personal injury in money is the nearest approach to the repair of the loss or detriment which the law has been able to devise. Compensation is not restitution, for there can be no restitution in personal injury; money can never constitute adequate and full compensation. So that in arriving at what is fair and reasonable compensation, the jury is not to consider alone the plaintiff, but the rights and situation of a defendant are to be considered. It is to be remembered that every defendant who is called upon to pay damages has its duties and obligations to perform, so that in assessing damages, the fair and reasonable compensation must not alone be fair and reasonable to the plaintiff, but it must be fair and reasonable to the defendant as well.

It is to be remembered that all assessments of damages in favor of a plaintiff, to be paid for by a defendant in personal injury, may to a more or less extent fall not alone upon the particular defendant, but through such defendant and his or its necessities it may ultimately affect others. This is the principle lying at the basis of compensation laws.

The jury will, therefore, assess fair and reasonable compensation to plaintiff, if you find in her favor.

¹ *McCatham v. Columbus Transfer Co., Franklin Co. Com Pl., Kinkead, J.*

The machine was hired to go to Urbana and return to Columbus; on the return the machine was kept out by one of the parties concerned in the hiring, who gathered up a party of men and women,

who visited wine rooms, taking liquors in the machine. No report to the garage was made after return from Urbana, though the machine was driven to the place of defendant to obtain gasoline, but the evidence did not directly show that knowledge of this fact was brought to defendant.

² White Oak Coal Co., *v. Rivoux*, 88 O. S. 31.

³ Klunk *v. Railway*, 74 O. S. 125.

⁴ The charge that was given in *White Oak Coal Co. v. Rivoux*, *supra*, was to the effect that when ownership, and the fact that the driver was in defendant's employ, the burden was on the defendant to show that the accident happened outside the scope of the employment. This was held error.

⁵ Babbitt Motor Vehicles, sec. 537; *Slater v. Advance Thresher Co.*, 97 Minn. 305.

⁶ Intoxication can be shown as a contributory cause. *Babbitt Motor Vehicles*, secs. 252, 450, 915; *Thompson on Neg.*, 2d ed., sec. 452; *McFern v. Gardner*, 121 Mo. App. 1; *McPhee v. Scully*, 163 Mass. 219, 40 L. R. A. 143, and cases cited.

⁷ *Babbitt Motor Vehicles*, sec. 566. See *Long v. Nute*, 123 Mo. App. 204; *Patterson v. Kates*, 152 Fed. 481. See *Berry Autos*, sec. 137. See cases cited in opinion in 88 O. S. 31.

CHAPTER LXXV.

BAILMENTS.

SEC.

1544. Loss of goods by negligence of storage company — Whether occasioned by natural decay, or by negligence in maintenance of temperature.

1545. Liability of garage keeper for safety of automobile entrusted to him.

SEC.

1546. Proprietor of garage bound to exercise supervision over employees to guard against wrongful taking out of stored auto.

1547. Liability of garage keeper for allowing customer's automobile to be taken out without authority.

Sec. 1544. Loss of goods by negligence of storage company, whether occasioned by natural decay, or by negligence in maintenance of temperature.

It is one of the conditions of the contract of storage between the parties that defendant company should not be responsible for loss or damage to property occasioned by natural decay.

If you find from the evidence that the goods in question were stored in a dry and suitable room, and that the defendant maintained the temperature of the storage rooms as stipulated for in the storage agreement therefor, and that the goods were damaged by natural decay, then defendant is not liable, although you may find the goods in question were returned in a damaged state as the result of such natural decay. And your verdict in such case should be for defendant.

If you find from the evidence that defendant failed to maintain the temperature of the cold storage room as stipulated for in the agreement, and allowed the same to become warmer or colder than that stipulated for, and you further find as the direct result of such failure the goods of plaintiff were damaged, or if you find from the evidence that defendant was negligent in

respect to placing the goods in question in an unsuitable room as alleged, and you further find as a direct result thereof that plaintiff's goods were damaged, then the plaintiff is entitled to your verdict.

It was the duty of the defendant to exercise reasonable care in placing the goods in a suitable room for such storage. Negligence is the want of ordinary care, and may consist in doing something that ought not to be done, or in not doing something which ought to be done. And ordinary or reasonable care is that degree of care which persons of ordinary care and prudence are accustomed to use under the same or similar circumstances.

If you find from the evidence that defendant failed to maintain the temperature of the cold storage room as stipulated for in the agreement, and allowed the same to become warmer or colder than that stipulated, and placed the goods in a damp, wet room, but that neither of said matters was the cause of the damage to the stored goods of plaintiff, if you find they were damaged when returned, then plaintiff can not recover. The plaintiff can not recover for any alleged damages which are not the direct consequence of some act or omission upon the part of defendant complained of.

The mere fact that the temperature may have fallen below that stipulated for, or went above the same, nor the fact that the room was damp and wet, if you find such to be the facts, would not of themselves warrant a verdict against defendant, unless you further find that such act or omission was the proximate cause of the damages complained of, if you find there was such damage.

It is the claim of defendant that plaintiff negligently allowed the horse radish to remain in storage after discovery by him of its decaying condition.

If you find from the evidence that plaintiff discovered any considerable time before removing same from storage, that the horse radish was in a decaying and wasting condition, it was his duty under such circumstances to use diligent efforts on his part to avoid such further damage from any alleged breach of con-

tract by the defendant company; and his failure to use reasonable care on his part to avoid further damage as would probably result from any alleged act of the defendant, if you find such to be the fact, it will prevent a recovery by him for any damages which may have occurred after such discovery and knowledge which might have been prevented by such reasonable effort on his part.¹

¹ *Becker v. The Crystal Ice Mfg. & Cold Storage Co.*, Common Pleas Court, Franklin Co., O., Rathmel, J.

Sec. 1545. Liability of garage keeper for safety of automobile intrusted to him.

The jury is instructed that a person who operates a garage and who holds himself out to the public as being willing to receive, keep and store automobiles for hire is to be considered as a bailee for hire; that as such bailee the law imposes a duty upon him to exercise reasonable or ordinary care in the matter of the care and custody of automobiles entrusted to his care by a patron. In no sense is he to be regarded as an insurer of the safety of or against the loss of such machine. The measure of care called for under the circumstances is such care as men, in general, bestow upon their own property similarly situated, the contract involving an understanding that the bailee may use the usual means for the protection of the property. That is, he is bound to use ordinary care in the selection of his agents, as well as in retaining them in his employ.

It follows that if an automobile so placed in the custody of a proprietor of a garage keeper for storage and repairs, which is injured or destroyed by the negligence of the garage keeper or his servants while acting within the scope of their authority, such garage proprietor is liable to the owner of the automobile therefor.¹

¹ *Fireman's Fund Ins. Co. v. Schreiber*, 150 Wis. 42, 135 N. W. 507, American Ann. Cases, 1913, E; *Roberts v. Kinley*, 89 Kan. 885, 132 Pac. 1180; *Wilson v. Wyckoff*, 133 App. Div. 92, affd. 200 N. Y. 561.

Sec. 1546. Proprietor of garage bound to exercise supervision over employees to guard against wrongful taking out of stored auto.

The jury is instructed that a proprietor of a garage owes a duty towards a person who delivers an automobile to him for storage and repair to exercise reasonable or ordinary supervision over his servants or employees; and if he has notice or knowledge that an employee is possessed of proclivities rendering it likely that he would injure the property of others so delivered, it is his duty to exercise ordinary care to protect the same from danger of injury to which it may thus be subject.

If such proprietor has knowledge of the proclivity or habit of an employee to take machines out without authority or justification, he should not be allowed to thus subject the property of his innocent customers to the danger of loss by failure to observe ordinary care and usual precautions to prevent damage by his dissolute or reckless employees.

It follows, therefore, if the garage proprietor fails to use ordinary and reasonable care by a method or system to prevent employees from taking the machines of a customer without authority, and an employee does so take the automobile of a customer of the garage without authority who injures the same while it is so in his wrongful possession, the proprietor will be responsible therefor.¹

¹ *Evans v. Dyke Auto Supply Co.*, 121 Mo. 266, 101 S. W. 1132; *Hughes Sons Co. v. Bergin Auto Co.*, 75 N. J. L. 355, 67 Atl. 1018. *Am. Ann. Cases*, 1913, E, note.

Sec. 1547. Liability of garage keeper for allowing customer's automobile to be taken out without authority.

The jury is instructed that where it is made to appear that an automobile garage keeper allows an employee to take out and drive the car of his customer who has stored it with such keeper, without the consent or authority of such customer, it is not essential to fix the liability of such keeper that it be shown that the auto was injured by the negligence of such employe. On

the contrary, proof of an injury to the car while so in the wrongful and unauthorized possession of such employee constitutes a *prima facie* case of liability on the part of such garage keeper, such liability being fixed by his own neglect in allowing the machine to go out of his possession.¹

¹ Wilson v. Wyckoff, 133 App. Div. 92, 117 N. Y. S. 783, 200 N. Y. 561, 93 N. E. 1135.

CHAPTER LXXVI.

BANKS—BANK DEPOSITS—BANK CHECKS.

SEC.		SEC.	
1548.	Cashier authorized to receive deposits — Authority of president to do so by custom or usage.	1551.	Relation of bank directors to public—Liability for defaulting officers.
1549.	Measure of care required of directors of bank in respect to acts of officers.	1552.	Liability of drawer of check.
1550.	Bank estopped to deny authority of officers.	1553.	The nature of a check—Rules regulating rights and liabilities of parties thereto.

Sec. 1548. Cashier authorized to receive deposits—Authority of president to do so by custom or usage.

The president of a national bank does not, under and by virtue of the act of Congress establishing and governing national banks, nor under the general rules of law applicable to banks and banking, by virtue of his said office of president, have power and authority to execute and issue certificates of deposit of said bank, and the certificate so issued by him does not, by reason of the fact that it bears his name as president, bind such bank.

The only officer of a bank who, by virtue of his office, has authority to receive deposits offered to a bank, and to bind the bank by his certificate therefor, is the duly elected and acting cashier. But the president may be authorized expressly, or by custom or usage in the conduct of the business of said bank, to transact any or all the duties devolving upon the cashier by virtue of his, the cashier's, office. It is competent for the board of directors to clothe the president with the authority and power to receive deposits and bind the bank by his official signature as president to certificates of deposit as effectually as the cashier may do. It is not required that this authority to the president be conferred by any express or formal action by the directors,

but it may be implied from circumstances, or a long uniform course of delay on the part of the bank. If the president in his capacity as president has been in the habit of receiving deposits and issuing certificates therefor, which habit has existed for a considerable length of time, and the directors, or a majority of them, for a long time knew of such habit, making no objections thereto, then an authority from them to the president to do such acts may be presumed, and if these acts were frequent, long continued, open and notorious, the knowledge of the directors may reasonably be presumed.¹

¹ Newby, J., in *Carlisle Barrere v. The Citizens Natl. Bank of Hillsboro of Highland Co. Com. Pleas.*; See similar charge, *Brickwood Sack. Insts.*, sec. 571; *Rankin v. Bank*, 188 U. S. 557.

Sec. 1549. Measure of care required of directors of bank, in respect to acts of its officers.

It is the duty of the board of directors of a bank to give such attention to its business as will enable them to become acquainted with and know the manner in which the business of the bank is being conducted, and to ascertain whether any officers constituted or appointed by them are disregarding or exceeding the authority intrusted to them by the board; and if the directors, in a careful and prudent discharge of their duties in this behalf, and by the employment of an ordinary amount of care therein, could or might have discovered that their president was usurping the functions of the cashier to the extent of receiving deposits and issuing certificates of the bank therefor, they will be charged in law with such knowledge as they could have thus obtained, and their silence and failure to object under such circumstances, would in law amount to an authority from the directors to the president to do the acts he assumed to perform in that regard, and to bind the bank therefor.¹

¹ Newby, J., in *Barrere v. Citizens Natl. Bank, Highland Co. C. P.*; *Morse on Banks*, secs. 125, 128.

Directors of national bank, under rule of ordinary care required of them, liable personally for the mismanagement or misfeasance of former directors under what circumstances. *Glass v. Courtright*, 14 N. P. (N.S.) 273.

Sec. 1550. Bank estopped to deny authority of officers.

And if the directors of a bank, or a majority of them, without objection or protest on their part, suffer and permit the president without authority expressly conferred, to exercise the duties of the cashier in the receipt of deposits and issuances of certificates of the bank to an extent that would justify a person with ordinary prudence and caution dealing with the bank, in the reasonable belief that the president had the proper authority from the directors to receive money and to perform the functions of the cashier, and if parties dealing with the president in good faith rely upon the appearances thus created, the bank will be estopped to deny that their president possessed the authority apparently possessed by him. But he must have relied in good faith upon such appearances, and if he knew that the president was exceeding his authority, or if he was in possession of knowledge of facts or circumstances which would arouse the suspicion of a man of ordinary intelligence and caution as to whether the president was dealing for the bank within the scope of his authority, under such circumstances, he would not be justified in relying upon such appearances, although but for such knowledge on his part he would be protected.¹

¹ Newby, J., in *Barrere v. Citizens' Natl. Bank*, Highland Co. Com. Pl.

Sec. 1551. Relation of bank directors to public—Liability for defaulting officers.

The directors of a national bank are guarantors to the public of the fidelity and integrity of the officers and agents selected by them for the management of the business of the bank, while those officers and agents may be acting within a reasonable scope of their duties as such officers. Where, therefore, there has been a misappropriation or embezzlement by an officer of a bank of a deposit received by such officer from a depositor for the bank by its authority, the loss will fall upon the bank and not upon the depositor. If an officer of the bank, therefore, be authorized by the board of directors, either expressly or impliedly by their

acts, to receive deposits for the bank and issue certificates therefor; and if the plaintiff at the bank and in the usual course of business delivered to such officer to be deposited in the bank, money which the officer received and issued certificates therefor in the money of the bank, then the plaintiff is entitled to recover from the bank the amount so deposited.¹

¹ Newby, J., in *Barrere v. Citizens' Natl. Bank*, Highland Co. Com. Pl.

Sec. 1552. Liability of drawer of check.

To render the drawer of a check liable to the holder, it will be sufficient if a demand upon the bank has been made, at the bank, during the usual hours of business, and notice of non-payment given to the drawer at any time before suit is brought against him thereon, unless it appear that the bank has failed during the delay of presentation, or the drawer has in some other manner sustained injury by the delay of the demand, or delay of notice of non-payment.¹

¹ *Frey v. Gragg*, Supreme Court, unreported.

Sec. 1553. The nature of a check—Rules regulating rights and liabilities of parties thereto

You are instructed that a check is a draft or order, drawn for the immediate payment of money, and that they are of such common use as to answer as payment for considerable amounts of money. Certain usages have grown up peculiar to this class of instruments, which have become engrafted on the commercial law of the land. A check is drawn upon an existing fund, and is an absolute transfer or appropriation to the holder, of so much money in the hands of the drawee. The drawer of a check is the principal debtor, and one who places his name on the back is an endorser. As between the holder or payee of a check and an endorser, demand of payment within the time due is essential to the liability of such endorser. Where the parties reside in the same place, the holder should present the check on the day it is received, or within business hours of the following day.

Mere delay in presenting a check in due time for payment does not discharge the drawer, unless he has been injured thereby, and then only to the extent of his loss. A check does not have to be accepted, and when presented it is for payment, and is payable when presentation and demand is made.¹

¹ *Morrison v. Bailey*, 5 O. S. 13; *Kinhead's Code Pldg.*, sec. 289.

CHAPTER LXXVII.

BASTARDY.

SEC.		SEC.	
1554.	Bastardy—Instructions.	1555.	Reputation of prosecutrix for truth and veracity.
	1. Statement of issues.	1556.	Reputation of defendant for virtue and chastity.
	2. Burden of proof—Degree of evidence.		
	3. Credibility of witnesses.		
	4. Verdict by jury.		

Sec. 1554. Bastardy—Instructions.

1. *Statement of issues.*
2. *Burden of proof—Degree of evidence.*
3. *Credibility of witnesses.*
4. *Verdict by jury.*

1. *Statement of issues.* The defendant in this case is charged by the prosecutrix, E. H., by her complaint in bastardy, that she, being unmarried, was delivered of a bastard child on the ——— day of ———, and that the defendant is the father of such child.

To this charge the defendant has pleaded not guilty, and thus the issue is made up for you to determine upon the evidence, under the charge of the court, the guilt or innocence of the defendant of the charge made against him.

2. *Burden of proof—Degree of evidence.* The burden of proof is upon the relator, or the prosecutrix, to make out her complaint and charge by the proper degree of evidence, which the court will explain to you.

While this proceeding is in a sense *quasi* criminal in its nature, the statutory remedy provided by law in bastardy is not necessarily in the interest or for the benefit of the prosecutrix, but the object and purpose is to protect the state and the county against the possible necessity of the care of any child that may be illegitimate. The jury is governed by the same degree of

evidence as in civil cases. The burden of proof is upon the prosecutrix to establish her charge against the defendant by a preponderance of the evidence.

You should not guess or act upon conjecture, but act only upon the sworn testimony of witnesses. Neither should you act in this matter upon any views you may have concerning this kind of a case which are not founded upon or supported by the evidence, nor should you be moved by sympathy.

In the trial of an issue of fact the jury are not expected to arrive at a degree of absolute certainty, but may under the law act upon probabilities.

A preponderance of the evidence means the greater weight thereof. If it is evenly balanced between the parties, or if it does not preponderate in favor of the prosecutrix on any of the material elements, it will be your duty to find the defendant not guilty; but if the evidence is greater, or preponderates in favor of the prosecutrix, then it will be your duty to find the defendant guilty.

3. *Credibility of witnesses.* The jury are the sole judges of the credibility of the witnesses; it seems needless for the court to point out the various tests that may be resorted to by the jury. But in cases where the testimony is conflicting, and where it may be evenly balanced upon any material part so far as the first knowledge of any affair like this is concerned, the jury may resort to any corroborative circumstances or facts as they have appeared to you, or as they may appear in the evidence, in determining what weight or what credibility you will place upon the testimony of the parties in this case. You may consider the testimony of disinterested persons as to any material matter that may have been testified to by any of the interested parties—interested in the sense of being parties to the action. You may consider the question of the interest of the immediate parties in weighing their testimony, in connection with all of the other facts and circumstances shown by the evidence.

4. *Verdict by jury.* It must be shown by the relator that she was an unmarried woman; that she was delivered of a bastard

child on ———; and that the defendant was the father of the child.

If you find by a preponderance of the evidence that the prosecutrix was unmarried, that she was delivered of a bastard child, and that defendant was the father of the child, then your verdict should be for the relator, the prosecutrix. But if, on the other hand, you find that defendant was not the father of the child, then it would be your duty to find the defendant not guilty. Your verdict should be one either of guilty or not guilty. The jury are not concerned with the judgment to be entered upon the verdict. You simply are to say whether defendant is guilty or not guilty. If your verdict should be one of guilty, the court then determines what judgment should be pronounced on that verdict. If your verdict should be one of not guilty, the court then enters up a dismissal of the case.¹

¹ State v. O., Franklin Co. Com. Pl., Kinkad, J.

Sec. 1555. Reputation of prosecutrix for truth and veracity.

Evidence has been offered for the purpose of impeaching the reputation of the prosecutrix here for truth and veracity. The reputation of a person for truth and veracity is determined by what people say of such person, or what they do not say. If you should be of the opinion after a consideration of all the evidence that the prosecutrix has been, in your judgment, impeached for truth and veracity, you are at liberty then to believe or disbelieve her testimony. Even though you may be of the opinion that she has been successfully impeached, you are not bound because of that fact to discredit her testimony. You may or you may not, as in your best judgment you deem proper, believe or disbelieve her testimony, without regard to the testimony offered as to her reputation for truth and veracity.

Sec. 1556. Reputation of defendant for virtue and chastity.

Evidence has been offered concerning the reputation of the defendant for virtue and chastity. The jury is instructed that such evidence is competent in favor of a party charged with bastardy, as tending to show that he would or would not be

likely to commit the act charged against him. If you find in this case from the evidence that prior to the alleged commission of the act charged against the defendant that he bore a good reputation for virtue and chastity among his neighbors and in the neighborhood where he lived, then this is a fact proper to be considered by you along with all the other evidence in the case, in determining the question of the defendant's guilt or innocence of the charge made against him. However, if from all the evidence in the case, including the evidence of the defendant's good reputation for chastity and virtue, you determine by a preponderance thereof that defendant is guilty as charged in the indictment, it will be your duty to so find by your verdict, notwithstanding the fact that theretofore the accused had borne a good reputation for virtue and chastity.

CHAPTER LXVIII.

BIGAMY.

SEC.	SEC.
1557. Bigamy refined—The statute.	1559. Common law marriage not
1558. Remarriage of wife before	basis for prosecution for
seven years absence of	bigamy.
husband, without divorce.	1560. Domicile of divorced parties.

Sec. 1557. Bigamy—Defined—The statute.

The statute of Ohio provides: Whoever, having a husband or wife, marries another, is guilty of bigamy. But this does not extend to any person whose husband or wife has been continually absent for five successive years next before such marriage, without being known to such person to be living within that time.

1. *Gist of offense.* The gist of the offense consists in going through the ceremony of a second marriage, which involves an outrage on public decency and morals, and creates a scandal by the prostitution of a solemn ceremony. The second marriage, if contracted in such form and manner that it would be binding upon the parties if they were legally competent, is sufficient to render one guilty of the crime of bigamy.¹

¹ Code, sec. 13022. Whether or not the husband or wife has so been continually absent without being known to the person to be living is matter of defense to be proved by the defendant. *Stanglein v. State*, 17 O. S. 453.

Sec. 1558. Remarriage of wife before seven years absence of husband, without divorce.

Where a husband has disappeared, and his wife marries again before the expiration of seven years without having obtained a divorce, she would be guilty if it should appear that her husband was alive at the time of her marriage.¹

¹ Supreme Com., etc., v. Everding, 20 C. C. 689.

Sec. 1559. Common law marriage not basis for prosecution for bigamy.

The fact that a man and woman cohabit together and make acknowledgment of the relation of marriage existing between them, but who have not been married according to the statute, does not constitute such marriage as to render a marriage by one of such parties to another after having broken off the former illicit relation.¹

¹ *Bates v. State*, 9 C. C. (N.S.) 273.

Sec. 1560. Domicile of divorced parties.

“If neither the husband nor wife was domiciled in the foreign state when the action for divorce was instituted or prosecuted, but both were then domiciled in Ohio, the decree of the court in the foreign state was void or inoperative beyond the limits of that state.”¹

¹ From *Van Fassen v. State*, 37 O. S. 317.

CHAPTER LXXIX.

BILLS AND NOTES.

SEC.		SEC.	
1561.	Burden of proof when consideration attacked.	1568.	Execution of note—Consideration—Payment of interest in advance.
1562.	Genuineness of signature.	1569.	Alteration of note—What constitutes — Adding words “with interest at — per cent.”
1563.	Purchase before maturity without notice of illegal consideration.	1570.	Alteration by adding name of third person.
1564.	Consideration — Delivery — Denial of execution—Alteration — Expert testimony as to signature.	1571.	Alteration by inserting words “to be paid annually.”
1565.	Transfer of note after maturity.	1572.	Demand and notice essential to hold endorser.
1566.	Endorsement in bank — Transfer before maturity.	1573.	Endorsement of note—Notice.
1567.	Liability of surety on note—How revived — Effect of subsequent promise.	1574.	When maker of note entitled to demand.
		1575.	Forgery as a defense—Estoppel to set up.

Sec. 1561. Burden of proof when consideration attacked.

The jury is instructed that where in an action upon a promissory note the defense is that the note was given or obtained without a valuable consideration, the plaintiff has the affirmative of the issue, and the burden of proof rests upon him to show a consideration for the note, by a preponderance of the whole of the evidence adduced on the trial.¹

¹ *Ginn v. Dolan*, 81 O. S. 121. This is the rule adopted in this case, but see discussion at *ante*, sec. 529, where burden of proof and weight of evidence is distinguished.

Sec. 1562. Genuineness of signature.

There have been offered in evidence fifty signatures of J. N., which signatures are admitted by both parties to be the genuine signatures of J. N. For the purpose of comparing these signa-

tures, they have been marked Exhibits 1 to 50, for the purpose of allowing you to compare the signatures with the note in suit with the admitted genuine signatures of J. N., to aid you in connection with the other testimony in determining whether the signature of J. N. to the note in suit is the genuine signature of J. N. The note in suit and the admitted genuine signatures of J. N. will be before you in the jury room for the purpose of allowing you to compare the name of J. N. on the note in suit with the admitted signatures. Witnesses have been called by both parties to express their opinions as to whether the name of J. N., attached to the note in suit, is genuine or not. These several witnesses have expressed their opinion before you upon that question. You are instructed that the opinion of such witnesses are competent, and may be considered. The weight to be given such testimony is entirely for you to determine. Their testimony may be given more or less weight by you in proportion as you believe the reasons which the witnesses give for their opinions to be strong or weak—as their reasons appear satisfactory or unsatisfactory to you. You are the sole judges of the weight to be given to the testimony of such witnesses, and of their credibility.¹

¹ Nye, J., in *Ingersol v. Gafkey*, Summit Co. Com. Pl.

Sec. 1563. Purchase before maturity without notice of illegal consideration.

If the purchaser pays cash for a note, he acquires it in the usual course of trade for valuable consideration. Before maturity is before a note, by its terms, is due and payable. Therefore, if you find that the plaintiff paid a cash sum for the note, before maturity, to a person authorized to sell it, and obtained the note, the note being payable to bearer, might pass by delivery; but the transfer is not defeated or affected by the endorsement of the payee, and the plaintiff would then have acquired it in the usual course of trade for a valuable consideration, and would be entitled to recover thereon, unless it appears from the evidence that he had, at the time, notice of the alleged

considerations, already stated and claimed to be in the note, or that he had information which ought to have excited the suspicion of a reasonable man thereto, and having the opportunity, failed and neglected, or refused to inquire thereto, because he was afraid he would thereby learn what he did not want to know. It is not sufficient, if it only appears that he took the note under circumstances that ought to have excited suspicion in the mind of a prudent and reasonable man; but it must appear that he took the note under circumstances as show he acted in bad faith or with a want of honesty, and in determining whether he so acted, you will look to all the circumstances and the evidence of the fact, if proved, as claimed, that he paid less than its fair and reasonable value for the note.

If under all the circumstances, you find the plaintiff acquired and holds the note by purchase in good faith, in the usual course of trade for a valuable consideration before due, without notice of such infirmities, your verdict will be in his favor for ———, with six per cent. interest to this date. Add together the sum so found, that is, the interest and principal, and the whole amount will be his damages.

If you find that the note was given for seed wheat at fifteen dollars per bushel and that such seed wheat proved worthless as such, then your verdict would be in favor of defendant, provided you further find that the plaintiff had notice of the worthless character of the wheat and of such consideration, or had such notice as to put him on inquiry to you.

¹ Nye, J., in *Ingersol v. Gafkey*, Summit Co. Com. Pl.

**Sec. 1564. Consideration—Delivery—Denial of execution—
Alteration—Expert testimony as to signature.**

A promissory note implies a consideration. It is not valid unless delivered by the defendant to the plaintiff, though, if you find the note in the hands of the plaintiff, duly executed by the defendant, you may then presume that it was delivered.

Upon the question of the execution of the note the burden of proof is on the plaintiff, and he must establish by a preponder-

ance of evidence that the defendant did sign the note. If he fails to thus prove the fact, your verdict should be for the defendant. Upon this question you can take into consideration the testimony of the experts, persons who by their experience in the comparison and observation of handwriting, are permitted to give their opinion whether the signature to the note in question is by the same hand as the signature to the deed and will, which have been proven to be the genuine signatures of the defendant. With these opinions and the other evidence in the case, you are to say whether the same hand wrote all signatures. You are to determine the weight of the testimony of these experts. If you determine that they are right in their opinions, your verdict should be for the defendant.

(a) *Alterations in date.* If you do so find you should then consider the question of alterations. These alterations, as claimed by defendant, are in the change of the date from an early to a later date, and in the body of the note a change in the principal. If these changes were made they are material changes, and if the plaintiff, without the consent of the defendant, made the alterations after the note was delivered, he has no right of action on this note. Has the note been altered? The figures at the left-hand top of the note are no part of the note, and a change in these figures is not material, but you may look at any alterations in those figures upon the question whether there was any alteration of the date or amount in the body of the note. Still, the question is, have any alterations been made?

Upon this question the burden of proof is on the defendant to prove that these claimed alterations were made after it was signed. You may look at the note to see whether any alterations have been made in either particular. If you find that there is no alteration, assuming that the signature of the note is the genuine one of the defendant, your verdict will be for plaintiff. If the note was altered, and the burden of proof of that, as was said, is on the defendant, you will then inquire whether the alteration was before or after the defendant signed the note. If you find it was altered after defendant signed the note, the

burden of proof will then be upon the plaintiff to prove that it was altered with the consent of the defendant.

If the note was signed after it was altered, it is a good note. If it was signed before it was altered and the maker consented to the alteration, it is a good note.¹

¹ *Franklin v. Baker*, Ex'r, 48 O. S. 296.

Sec. 1565. Transfer of note after maturity.

The jury is instructed that if the paper was transferred after it became due, and it no longer has the character of commercial paper before due, if it was transferred after it was due, the person to whom it was transferred steps simply into the shoes of the person that transfers it to him, and the maker of the paper can then urge against him, if he sues upon the paper, the same claim, the same suit, that he could make against the person to whom he originally gave the paper if he sued upon it.¹

¹ *Solders, J.*, in *Platt v. Hazzard*, Sup. Ct., unreported.

Sec. 1566. Endorsement in blank—Transfer before maturity.

This note is payable to the order of J. W., T. H. gives him that note; there is nothing upon the face of the note to indicate any contract made at the time. It places it within the power of T. to transfer the note to anybody. He has signed his name upon the back of the note and nothing more, which is known as a blank endorsement, and that authorizes any person to whom he transfers it to write above it a transfer to him, or a transfer to some other person. In other words, this is not a restrictive endorsement; that is to say, a restrictive endorsement would be to a particular person only. The note is not given to T. individually, but it is given to him with the power of transferring it to anybody. The law makes that paper circulate as money before due. If action had been brought upon the paper by T., then Mr. H. could offset against him anything, any demand that he has against him, and especially could he offset this \$925.00, as the testimony indicates was due, and which the plaintiff does not controvert. If that contract was made at all he could offset this against this note. If paper, commercial paper, which this

is, is transferred before due to another person, who at the time pays value for it, such person holds the paper free from all claims and set-offs—and in that connection I wish to say to you that this man P. stands upon this paper as an endorsee, holding the paper. That where the endorsee of negotiable paper pays cash therefor he is a purchaser in the usual course of trade, unless the fact was that he paid for the note a sum less than the fair and actual value—not necessarily that he should pay the actual value, that is a matter of agreement—but if it is transferred before due, for value paid, there being no bad faith, or want of honesty at the time on the part of the person to whom transferred, he takes it clear from any claim that the maker of the note could urge against the person to whom he originally gave it, in this case T.¹

“You are instructed that where a note has been endorsed in blank, the holder of the same may fill the blank with the name of the endorsee; that the endorsement of the note is said to be in blank when the name of the endorser is simply written on the back of the note, leaving a blank over it for the insertion of the name of the endorsee, or of any subsequent holder; and that in such a case while the endorsement continues blank, the note may be passed by mere delivery, and the endorsee or other holder is understood to have full authority personally to demand payment of it, or make it payable at his pleasure, to himself or to another person.”²

¹ Solders, J., in *Platt v. Hazzard*, Sup. Ct., unreported.

² From *Palmer v. Marshall*, 60 Ill. 292.

Sec. 1567. Liability of surety on note—How revived—Effect of subsequent promise.

“If the defendant’s testator, having been discharged from his liability as surety upon the note sued on, with a full knowledge and understanding of his release as surety, promised the holder or payee to pay the note, if the principal did not, he thereby revived his liability as surety, and such subsequent promise was binding without any new consideration to support it.”¹

¹ *Bramble v. Ward*, 40 O. S. 267.

Sec. 1568. Extension of note—Consideration—Payment of interest in advance.

“The payment of interest in advance is not of itself conclusive of a contract to extend the time of the payment for the term for which interest may have thus been paid, but it is a strong circumstance to be looked to by the jury in determining the existence of the contract claimed.”¹

¹ *Gard v. Neff*, 39 O. S. 607.

Sec. 1569. Alteration of note—What constitutes—Adding words “with interest at — per cent.”

If you find from the evidence that after the defendant signed a note similar in all respects to the one sued on, excepting that the written words, “with interest at ten per cent.,” and that these words were not then in the note, but that the printed words, “with interest at ten per cent. per annum after maturity,” were in the note, and that, after the defendant placed his signature thereon, and without his knowledge or consent, the said printed words were stricken out and the said written words inserted, and that such an alteration of the note was made by any holder of the note, without the knowledge of the defendant, it would be a material alteration, and would release him from all liability on the note. And if the defendant proves this by a preponderance of the evidence, the verdict must be in his favor; and it would make no difference whether J., the plaintiff, was or was not the owner of the note at the time of the alteration after the defendant signed it.¹

¹ *Brooks v. Allen*, 62 Ind. 401.

Sec. 1570. Alteration—By adding name of third person—Whether material or not.

The jury is instructed that if there was a material alteration of the note after its execution and delivery, with the consent of its holder, but without the knowledge or consent of K., such material alteration would discharge K. from any liability on the note. An alteration to be material must be of the note after

it is signed and delivered, without the consent of the person who executed it. The court has stated the rule when there is a material alteration of the note, with the consent of its holder, and without the knowledge, procuration, or consent of the maker, it releases the maker of the note. The addition of the name of a third person as maker, with the privity of the holder, but without the consent of the original signer, is a material alteration of the note, which discharges such original signer. This would not be so, however, if the third person signed the note as an apparent maker through inadvertence or mistake as to any fact. In this case it is not claimed by S. that there was any mistake as to any fact relative to or connected with the signing of his name on the note. He claims in his testimony that he signed the note for the single purpose of vouching that K. was worth about \$3,600, but if there was no inadvertence or mistake of fact in his signing, he can not dispute or vary the written contract above his name which he signed. When he signed this paper (the note) his contract was in writing, and he will not be permitted to dispute it, unless he can show that there was some inadvertence or mistake as to some fact. Having signed the note on its face as an apparent maker, for a valuable consideration, he must be held to sustain to the note the relation of maker, unless he can show that there was some inadvertence or mistake of fact relative to or connected with such signing. A mistake of law does not excuse him. Every person is presumed to know the law, and he is not permitted to say he did not understand the legal effect of his act. Before signing his name Mr. S. was what is called a "stranger" to the note. He would have been *prima facie* a guarantor of the note if he had placed his name on the back of it, in that case there would be a presumption that he was a guarantor. But, being a stranger to the note, and signing it on its face, signing the written contract, the written contract must be held to govern, unless he shows that there was some mistake of fact, not of law, in such signing. No one pretends to say that he didn't read the contract. No one pretends to say he meant to sign it any place but where he did sign it. If you find that the defendant, S., for a valuable con-

sideration, signed the note as maker, he is liable on the same, unless he can show some legal reason why he should not pay it.¹

¹ Price, J., in *Smucker v. Wright*, Sup. Ct., unreported.

Sec. 1571. Alteration by inserting words "to be paid annually."

The defendants claim that after the note described in the petition was executed by said M., and without the consent or knowledge of either of them, the plaintiff altered said note by inserting or causing to be inserted in said note the words "to be paid annually" after the word interest. Thus by said alteration changing the terms of said note, making the interest payable annually instead of being payable when the note became due, and that they have never since ratified said alteration.

Such alteration, if made as claimed by defendants, would be a material alteration, changing the effect and operation of said note, and upon said note in such case the plaintiff could not recover in this action, unless said alteration has been ratified by the defendants, or by one of them.

That such alteration was made as claimed the defendants must prove by a preponderance of the evidence.

Such alteration, if made by a party not interested in the note, and without the knowledge or consent of plaintiff would not affect the note.

If such alteration of the note was made by plaintiff, as claimed, and if afterward the defendants, or either of them, with full knowledge of such alteration, ratified the same by part payment, or by direct and unconditional promises to pay said note, then said defendants, or whichever of them so ratified such alteration, would be liable on said note as altered, and against the defendant who ratified said alteration the plaintiff can recover. Such ratification must be proved by the plaintiff by a preponderance of the evidence.¹

¹ *Miller v. Vollrath*, Sup. Ct., No. 1728. Judgments of lower courts affirmed, 27 W. L. B. 36. Alteration by a stranger does not vitiate, *Waring v. Smyth*, 2 Barb. Ch. 119; *Bank v. Roberts*, 45 Wis. 373, 1 Am. and Eng. Enc. of Law, 505. See also *Greenleaf's Ev.*, sec. 556; 2 *Daniel's Neg. Inst.*, sec. 1373a. *Drum v. Drum*, 133 Mass. 566.

Sec. 1572. Demand and notice essential to hold endorser.

It is conceded that said defendant O. is the endorser of said note. In order to hold said O. as such endorser of the note the plaintiffs must prove by a preponderance of the evidence that demand was made on M.—that is, a presentation of the note and a request to pay it when due on the —— day of February, 19—.

If the demand was made on M. personally, or, if he was gone from home, upon any agent of his at his home or place of business whose duty it was to transact business or pay money for him; if there was no agent and M. was away from home, then at the house of his wife or servant, or, in the absence of wife or servant, of some other person belonging to the family, and if there was no such agent and no person at home, and upon reasonable inquiry none of the persons I have named could be found and M. was gone, no demand was necessary.

If demand was made and payment refused, notice of such demand and nonpayment, or if no demand could be made, notice of nonpayment should have been communicated to said O. by the first ordinary means of giving him the information taking into account his whereabouts.¹

The endorser may waive demand and notice of nonpayment, and any conduct on his part toward the plaintiff, calculated to put a person of reasonable prudence off his guard, or to induce such person to omit demand or notice of nonpayment will dispense with the necessity of taking such steps. That such demand was made and notice of demand and nonpayment was given, or that the same was waived by the defendant, O., the plaintiff must prove by a preponderance of the evidence.²

¹ By mail, *Walker v. Stetson*, 14 O. S. 89. By the next mail after default, *Lawson v. Bank*, 1 O. S. 206. By mail if living in same town, 8 O. 507.

² From *Mills v. Vollrath*, Sup. Ct. No. 1728. Judgments of lower courts affirmed, 27 W. L. B. 36. As to waiver, see *Hale v. Danforth*, 46 Wis. 554.

Sec. 1573. Endorsement of note—Notice.

You are instructed that an endorsement of a note, that is, the writing of one's name upon the back of the note, is an

absolute contract in writing by which the endorser binds himself to pay the note, if on presentment the maker does not, provided due notice is given of nonpayment.

In order to render one who becomes an endorser on a note not liable for the payment, the note must be presented at maturity to the maker for payment, and if payment be refused, notice must be given immediately to the endorser, and whether this has been done is a question of fact submitted to you for determination.¹

¹ Farr v. Ricker, 46 O. S. 265.

Sec. 1574. When maker of note entitled to demand.

You are instructed that it is not generally necessary that presentment or demand of payment be made at a specified place of the maker of a note on the day it becomes due or afterwards, in order to maintain a suit against the maker. But if the maker has funds at the appointed place where the note is payable, and it is not duly presented, he will be exonerated from the payment of any damages that may have been sustained and costs of suit, but will not be relieved from the payment of the note.¹

¹ Bridge Co. v. Savings Bank, 46 O. S. 224.

Sec. 1575. Forgery as a defense—Estoppel to set up.

The jury is instructed that one may by his conduct, statements, or silence estop himself from claiming that his signature to a note is a forgery, but before he can be estopped by mere silence, it must be made to appear by the evidence that there was an obligation and duty on the part of the defendant to speak out and declare the fact that his name was not signed to the note; it must also be made to appear that he had an opportunity to speak, that he also knew, or had reasonable ground to believe that the plaintiff as holder of the note would rely, or was relying on his silence concerning the signature, and that plaintiff so relied upon his silence and that he was injured thereby.¹

If, therefore, the jury finds, etc.

¹ Shinew v. Bank, 84 O. S. 297, Am. Ann. Cas., 1912, C., 578 and note; Veile v. Judson, 82 N. Y. 32; Wiser v. Lawler, 189 U. S. 260.

CHAPTER LXXX.

BREACH OF PROMISE TO MARRY.

SEC.

1576. Contract of marriage.

1577. Breach of promise of marriage.

1. Contract of marriage—
Its nature—How made.
2. Effect of physical condition or impediment.
3. Request to perform essential to action.
4. Deceit as to age.

SEC.

5. Claim that plaintiff afflicted with disease.

1578. What amounts to a breach—
Essentials as to time.

1579. Promise made in consideration of sexual intercourse.

1580. Acts of preparation of marriage.

1580a. Measure of damages.

Sec. 1576. Contract of marriage.

A contract of marriage consists simply in a promise on the part of the one to marry the other, and in a promise on the part of the other to marry the one. It is a mutual promise, the consideration of the one's promise being the other's promise.

Contracts of marriage may, like other contracts, be either express, that is, based upon actual, particular words, a direct proposition on the one part, and a positive, explicit, verbal acceptance of the proposition by the other, or the marriage contract may arise by implication; that is to say, that such a contract may come into existence, as a result of the conduct and demeanor of the parties by their acts towards and treatment of each other, by frequency of association together and by other circumstances of like nature.¹

¹ May be shown by conduct. *Wetmore v. Mell*, 1 O. S. 26.

Admissions of intention to marry may be shown. *Cooper v. West*, 3 W. L. B. 431.

Sec. 1577. Breach of promise of marriage.

1. *Contract of marriage—Its nature—How made.*
2. *Effect of physical condition or impediment.*

3. *Request to perform essential to action.*
4. *Deceit as to age.*
5. *Claim that plaintiff afflicted with disease.*

1. *Contract of marriage—Its nature—How made.* This is a case for the breach of promise of a contract of marriage. A contract of marriage according to the law of the land, is to be considered as an ordinary civil contract attended by the same legal consequences as any ordinary civil contract. While it is the foundation of all society, still when we come to treat it in a court of justice it is to be regarded as an ordinary civil contract. It is not entered into with the same formalities as ordinary civil contracts, and it may not be entered into in one case like it would be in another.

The contract of marriage consists simply in a promise on the part of the one to marry the other, and a promise on the part of the other to marry the one. That is, it is a mutual promise between a man and a woman to enter into the marriage relation. The condition of the contract, in law, is the mutuality of the promises. Whereas, the consideration in morals is the affection between the parties, but we must say that every civil contract is founded upon a consideration, and so we say that in law the consideration for a contract of marriage is the mutual promise made by each of the parties.

Now testing this kind of a contract as we do ordinary civil cases, it is essential to constitute a contract to marry that there must be a meeting of the minds of the contracting parties. That is, there must be an offer on the one part and an acceptance on the other. Contracts of marriage may be entered into by their offer and acceptance. Then, on the other hand, contracts of marriage may be inferred from the acts and the declarations, and from the conduct of the parties; that is, if the acts and the declarations and conduct of the parties are such as would lead reasonably prudent men to believe and infer that the parties intended that they should become man and wife, then the jury would be justified in concluding under such circumstances that a contract of marriage had been entered into by the parties.

2. *Effect of physical condition or impediment.* As I stated, the promises being mutual, each is usually the consideration for the other. Putting it more concretely, a further consideration may enter into the contract, as the expectation of each of the parties to obtain and associate in the marriage relation, with one whose physical condition is free from any serious disease which might be of such a nature and character as to unfit either party as a companion in the marriage relation. Each party may contract with the other in the expectation of having a person who can be a comfort and a satisfaction in every way in the marriage relation. We must not lose sight of the fact that we are dealing with a marriage contract, pure and simple, however, and that such a contract does not require the one to take the other if such other person is in an imperfect condition by reason of having a serious disease which might entail great discomfort, expense and risk in the marriage relation. But if it appears from the evidence that there was no physical condition or impediment existing at the time of the formation of the contract, if there was one entered into, then the matter of the complaint made here as to the physical condition of the plaintiff may not be considered in connection with the formation of the contract.

3. *Request to perform essential to action.* As a general rule, it may be said that when an obligation is entered into to do a certain thing in the future, and when an express time is indicated within which the thing shall be done, before suit can be brought for the breach of an obligation, there must be a request by the person who seeks to enforce the contract of the party to perform his obligation.

And the marriage contract is no exception to this rule of law, because it is regarded as merely a civil contract. It appears in evidence, however, in this case, that the defendant himself put an end to whatever relations may have existed between the parties in this case, so that the question as to whether or not there was a time fixed for the marriage and whether the plaintiff requested the defendant to carry out and perform his contract is not material.

4. *Deceit as to age.* The defendant here by his answer claims that the plaintiff deceived him as to her age, claiming to be several years younger than she was and that she has not been truthful and fair with him in many ways, etc. The court instructs the jury that such a claim does not in law constitute a defense in this kind of an action, but the jury may consider it, if it is supported by evidence, by way of mitigation of damages.

5. *Claim of affliction with disease.* The court will now instruct the jury as to the claim made by the defendant that the plaintiff was afflicted some time during the relations existing between the parties with a disease known as tuberculosis.

It is for the jury to determine when, if at all, a contract of marriage was entered into between the parties to this case, and if it should appear to the jury that before the contract of marriage was entered into between them, if there was one, that the plaintiff was afflicted with the disease as claimed here, then the court instructs the jury that the rule of law applicable to such a case is, that when a man enters into an engagement of marriage with a woman, he is presumed to have made himself acquainted with her appearance and her physical condition so far as it may be reasonably apparent to him, and if he enters into a contract of marriage with knowledge of any physical defects, or under such circumstances that he should be charged with knowledge of them by reason of their apparent condition, and he changes his mind and refuses to marry the woman, the existence of such a disease will not constitute a defense to an action for breach of promise.

But if the jury, on the other hand, should find from the evidence that the plaintiff and the defendant entered into a contract of marriage some time prior to the month of —, when it is claimed by the defendant that the plaintiff became afflicted with the disease of tuberculosis, then the court instructs the jury that the law applicable to such a situation as it might be presented in this case is as follows :

The defendant claims that the disease made its appearance about the time as just stated, and that this physical condition on

her part continued on throughout the remaining portion of the year 19—, and he claims that he became discouraged because of such disease and had a change of mind and attitude towards the plaintiff.

The court has already pointed out the light in which the marriage contract is considered in law as well as its peculiar nature, and the jury, using its own knowledge of the character of the disease, which it is claimed plaintiff had, together with any evidence offered in this case as reflecting thereon, may consider the consequences of the consummation of the marriage contract under such circumstances; and if it should appear that the plaintiff was afflicted with the disease as claimed, the jury may consider the physical condition so far as it might affect the immediate parties to the contract.

The court may properly state that the law should not enforce such a contract under the conditions claimed here with the same rigidity as this class of contracts is generally enforced in law. There is a growing tendency of opinion that the marriage relation should not be entered into between parties afflicted with such a disease as the one claimed because it is considered to be incurable, and this view demands some attention and consideration in the matter of the enforcement of a marriage contract under such conditions as is claimed to exist in this case. The court takes the position that if it should appear by a preponderance of the evidence in this case that the plaintiff became afflicted with the disease of tuberculosis which became known to the defendant, then he would have a right upon this ground to terminate any contract of marriage that might be existing between them. In making such a contract, the defendant must not be held bound to take a woman who may have a disease that might unfit her as a wife and which might involve him in expense and risks from such a disease as is complained of in this case.

Therefore, the court instructs the jury that if it finds that the plaintiff was not afflicted with the disease of tuberculosis at the time of the contract of marriage as claimed, but if it does

appear that such a disease was contracted by her subsequently to the contract of marriage, and the jury finds that she had such a disease, and that the defendant broke the contract of marriage existing between them for this sole reason, that would in law, be a defense in this action, and the jury should in such event find for the defendant.¹

But, on the other hand, gentlemen, if you should find that the plaintiff did not in fact, at any time during the existence of the contract of marriage, as claimed, have the disease of tuberculosis, but if you find that notwithstanding this fact the defendant in good faith believed that she had such disease, and had reasonable grounds for such belief, and that he broke the contract of marriage for this reason, then, you may consider this matter not by way of defense, but merely for the purpose of mitigation, that is, reducing the damages which you may assess against the defendant, if you find that a contract of marriage was made between the parties, and that the same was broken by the defendant.²

¹ See 112 Pa. St. 244.

² *Temple v. Davis*, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1578. What amounts to a breach—Essentials as to time.

As a general rule it may be said that when an obligation is entered into to do a certain thing in the future, and partly when an express time is indicated within which the things shall be done, before suit can be brought for the breach of an obligation, there must be a request by the person who seeks to enforce the contract of the party to perform his obligation. The marriage contract is no exception to this rule of law, being regarded by the law simply as a civil contract. Before there can be a breach of the contract there must be an express request to consummate the marriage, or something which under the circumstances of the particular case removes the necessity of that request. A man could not complain of a woman for breach of promise to marry unless he requested her to keep her engagement, neither

can a woman complain of a man for breach unless there is a request made of him.

If a man agrees to do a thing within a reasonable time and afterwards upon being requested to do it refuses, then he has repudiated his obligation and broken his contract. In the absence of a request and in the absence of indicative circumstances, he may intend to keep or he may intend to break his contract, but it may be important to see what his intentions are. If it can be said that he intends to break or keep his contract, it may be more difficult to determine and to say that he has actually broken his engagement.

If the plaintiff became convinced or fearful that the defendant did not intend to carry out his part of what was understood to be their engagement to marry, she might have gone to him and verbally tendered herself to him, and requested that he should marry her in fulfillment of the contract. That would have been a perfect and thorough compliance with the law, and a thing eminently proper. But circumstances may intervene which will remove the necessity for this explicit action upon her part.

If it appears from the evidence that there was an engagement, and that the defendant himself broke that engagement, the fact appearing to the jury either by the acts or words of the defendant, or by both his words and his conduct, then it is not necessary that the plaintiff should have offered herself to the defendant in marriage, or that she should have formally requested him to marry her before bringing this suit. The law assumes that where a man is under an obligation to fulfill a contract, if he voluntarily renounces it, he puts himself in the attitude of refusing in advance to carry out the contract, and that knowledge is clearly brought home to the other contracting party, then the necessity for the offer or request from the other party is removed and taken away, because it is useless.

If you find that there was a contract of marriage, and a breach of that contract by the defendant, the only question remaining for your determination is, Was the plaintiff damaged by this breach, and if so, in what sum? ¹

¹ Wright, J., in *Hunter v. Graham*, Hamilton Co. Com. Pleas.

Sec. 1579. Promise made in consideration of sexual intercourse.

If you find from the evidence that the defendant did promise the plaintiff to marry her, but that the inducement for the making of such promise by the defendant was that the plaintiff should permit him to have sexual connection with her, then I charge you that such promise would be void, and the defendant not bound by it. An agreement to marry, made by a man to a woman in consideration of having sexual intercourse with her before marriage is immoral and void. "As the object of the law is to repress vice and immorality, and promote the welfare of society, all promises which originate in a breach or violation of its principles and enactments, are void. This law will not therefore lend its aid to enforce any contract which will lead to the commission of crime or immorality, or which is subversive of public morality." So if there was a contract of marriage, but it was made on condition and on the consideration that the plaintiff should allow the defendant to have sexual intercourse with her before marriage, such contract was void and no recovery can be had for its breach, it being founded on an immoral consideration.

"But it is no defense if the promise was made after fornication; if made with no view to a repetition of the offense, or before fornication, if that was not the consideration of the promise, if the consideration was the mutual promise of marriage—the promise of each to marry the other—the contract was a valid one notwithstanding there may have been sexual intercourse between the parties, either before or after the promise was made. If it appears that the promise was made by the defendant with a view to seduce the plaintiff, and that the defendant thereby did in fact seduce the plaintiff, this will be no defense, but may go to the jury in aggravation." ¹

¹ Wm. E. Evans, J., in *Little v. Gearhart*; affirmed 51 O. S. 580; Sedgwick Meas. Dam. 455 (369). As to promise based on sexual intercourse being void, see *Hanks v. Naglee*, 54 Cal. 51; *Boigner v. Boulon*, 54 Cal. 146; *Steinfeldt v. Levy*, 16 Abb. Pr. (N.S.) 26; *Goodall v. Thurman*, 1 Head, 209.

"A promise to marry is not unfrequently one of the base and wicked tricks of the wily seducer to accomplish his purposes, by overcoming that resistance which female virtue makes to his unholy designs. Whenever seduction follows an engagement to marry, it may well be asserted that the promise on the part of the man was intended to cover his designs upon her virtue, by winning her affections and confidence. The fact that the hypocritical suitor is prepared to destroy her character, shows conclusively that it was not his intention to make her his wife." *Goodall v. Thurman*, 1 Head, 209.

In *Hotchkins v. Hodge*, 38 Barb. 117, the court held: "A wrong done to the female, such as sexual intercourse with her, by her alleged suitor, will not make a promise to marry, founded thereon or arising therefrom, invalid or inoperative. Such a promise is not liable to the objection that it encourages immorality."

Sec. 1580. Acts of preparation for marriage.

Evidence has been offered to prove that the plaintiff made some preparations for marriage by procuring bedding, etc., and statements by her at the time, explanatory of such acts of preparation. To be admissible in evidence such declarations must be made at the time of such alleged act of preparation, must be concomitant with them, and explanatory of them; and such acts must be before the rupture between the parties, before the breach of the promise. If such declarations were made, but were merely narrative of a past occurrence or transaction, or the acts of which they were explanatory were after the rupture between the parties, they are incompetent as evidence, and you will not consider them, but will treat them as excluded from the case. If such declarations were made and were concomitant with and explanatory of acts of preparation for marriage, and such acts were before a rupture between the parties, they are competent to be considered by you.¹

¹ *Evans, J.*, in *Little v. Gearhart*, 51 O. S. 580; *Wetmore v. Mell*, 1 O. S. 26.

As to promisee's conduct in getting ready, see *People v. Kenyon*, 5 Parker's Cr. C. 254; and her declarations, 2 Am. and Eng. Enc. of Law, 521. Declarations to strangers of the fact of the engagement are not competent unless part of the *res gestae*. *Stribley v. Welz*, 8 O. C. C. 571.

Sec. 1580a. Measure of damages.

If you find in favor of the plaintiff, you will award her damages to indemnify her for the loss she may have sustained by such breach of promise. This would embrace the injury to her feelings, affections, and wounded pride, as well as the loss of marriage.

There is no precise rule by which to fix the amount of compensation. The measure of damages is a question for the sound discretion of the jury under the circumstances of the case as disclosed by the evidence. This is to be sound discretion uninfluenced by passion or prejudice; and the amount of damages is to be such sum as the jury, exercising such judgment and discretion under all the circumstances of the case as shown by the evidence, determine and find is proper and adequate to indemnify and compensate the plaintiff for the loss and injury so sustained.

If the defendant's conduct in the matter of the promise and breaking it (if he did so) was ruthless and wanton toward the plaintiff,¹ you may, if you think it proper under all the circumstances of the case, in addition to compensatory damages award exemplary damages in such sum as you think proper under the circumstances. The entire amount of the award can not exceed the amount claimed in the petition.²

¹ *Duvall v. Fuhrman*, 3 O. C. C. 305.

² *Wm. E. Evans, J., in Little v. Gearhart*. Judgments affirmed, 51 O. S. 580. Seduction may be shown to enhance damages. *Matthews v. Cribbett*, 11 O. S. 330. Value of defendant's estate may be shown to show greater loss. 8 O. C. C. 571, 3 O. C. C. 305, and subsequent acquisitions of property may be considered. 3 O. C. C. 305.

CHAPTER LXXXI.

BRIBERY.

SEC.

1581. Bribery—State official—Aider and abettor—Complete charge (embracing subjects shown in sectional heading).

1582. Solicitation of bribe.

1. Statute and essentials of crime.
2. Solicitation of — What constitutes.
3. Same—Intent.
4. Jury to determine meaning of language used.

SEC.

5. Intent and motive—Consideration of other solicitations.

6. Declarations of parties —Received with caution.

1583. Reputation of accusing witnesses.

1584. Bribery of city official — Form of complete charge, embracing subjects shown in sectional heading.

Sec. 1581. Bribery—State official—Aider and Abettor—Complete charge embracing:

1. *Preliminary admonitions because of importance of case.*
2. *Jury cautioned not to draw inferences from rejected testimony.*
3. *The charge in the indictment.*
4. *Plea and burden of proof.*
5. *Presumption of innocence.*
6. *A reasonable doubt.*
7. *Duty of jurors to confer with each other.*
8. *Credibility of witnesses—A full statement as to.*
9. *Same—Dictagraph.*
10. *Criminal charges against witnesses.*
11. *Reputation of defendant for honesty and integrity.*
12. *Law as to bribery.*
13. *Same—To solicit a bribe.*
14. *Same—To influence official duty.*

15. *Same—The bribe need not be the only consideration to influence.*
16. *The intent.*
- 16a. *Jury the sole judges of meaning of language used.*
- 16b. *Law as to aider and abettor.*
17. *Conspiracy between defendants and others to obtain money.*
18. *Entrapment into crime—Status of those participating therein.*
19. *Defendant may be guilty though entrapped.*
- 19-a. *Detectives not aiders and abettors.*
20. *Immunity of detectives entrapping.*
21. *Final instruction to jury as to their duty and verdict.*

1. *Preliminary admonitions because of importance of case.*

The judge and the jury in this case constitute the court established by the constitution and laws of this state for the administration of justice as between the commonwealth and the defendant. The majesty of the law is in our hands for the time being and it is the duty to do equal justice as between the state and the defendant. There is no higher function falling to the lot of men than the administration of justice.

In the performance of these duties the court and jury must be moved by the highest and most solemn sense of duty. If we are not actuated by a desire to perform our whole duty courageously and impartially, we will not be entitled to the respect and confidence of the people of the state.

Society demands no higher duty than purity, impartiality, courage and intelligence in the performance of any public duty. And among all the public duties which men are called upon to perform under the laws of society, one of the most important rests upon the jury, selected from the common people, which is the final arbiter of the facts concerning the alleged violation of law or of public duty involved in this case. In all your deliberations you should exercise the judgment of candid, intelligent men, men who are anxious only to get at the truth. The question involved in this case is of vital importance to the state and to the defendant. The citizenship of the state and the

defendant will be satisfied with a fair, intelligent, impartial consideration and determination by you, gentlemen of the jury, in this case.

It is essential to the welfare of society and good government that every guilty man shall be punished when his guilt is established by the measure of proof required to convict of crime in a court of justice. It is equally essential to the welfare of society and of good government that there shall be no conviction of a person if there is a reasonable doubt of his guilt.

The importance of your duties admonish you that your verdict shall be reached with great care, uninfluenced by anything except the evidence admitted in this case and the law applicable thereto, and that it shall be the result of purity of mind and of your soundest and best judgment upon the whole case.

2. *Jury cautioned not to draw inferences from rejected testimony.* Instructions are based on different phases of evidence.

The court admonishes you that you shall not draw any deductions, either favorable or unfavorable to either side of this case, by any offers of testimony which the court rejected or from any questions which may have been asked of witnesses which the court did not permit to be answered.

The court wishes the jury to know and understand that these instructions which are given you are based upon the evidence in this case and upon the different phases thereof, so as to enable you to decide the questions of fact submitted to you by the application of the law thus given you. The jury being unacquainted with the law, the court requests that, as this charge is in writing and will be placed in your hands, you may read it yourselves in your jury room, so that you may make no mistake in the application of the law.

3. *The charge in the indictment.* (Omitted. It can be supplied in each case.)

4. *Plea and burden of proof.* To this indictment the defendant has entered a plea of not guilty which puts in issue and denies each and every averment thereof.

This plea of defendant places upon the state the burden of proof. It is incumbent upon the state before it can ask a con-

viction by your verdict to establish to your satisfaction beyond a reasonable doubt the truth of each of the averments essential to constitute the crime charged.

5. *Presumption of innocence.* The indictment creates no presumption of guilt against the defendant. On the contrary, the law presumes every one charged with crime to be innocent until his guilt is established beyond a reasonable doubt. The defendant is entitled to this presumption in the consideration of this case and until the jury believe beyond a reasonable doubt that the evidence establishes his guilt. The degree of proof to be applied in criminal cases and in this case is proof of guilt beyond a reasonable doubt.

6. *Reasonable doubt—Rather full explanation.* A reasonable doubt is an honest uncertainty existing in the minds of a candid, impartial, diligent jury, after a full and careful consideration of all the testimony with an honest purpose to ascertain the truth, irrespective of the consequences which may follow the verdict of the jury. It is not a mere captious or speculative doubt, one voluntarily excited in the mind in order to avoid the rendition of a disagreeable verdict; it is not a doubt created by any personal feeling of sympathy, or of opinion or policy not based upon the testimony; it is not a doubt prompted by the prejudice of the jury which may arise in the minds of the jury from anything occurring in the evidence and contrary to any rule of law which the court has given to you. You are bound to follow the instructions of the court as to all matters and you should not permit yourselves to create in your mind any doubt that may arise from any feeling which you may have with respect to any feature of this case which is not founded upon the evidence and the law as given you by the court. Such a doubt would be considered in law as merely a captious and as an unreasonable one. To acquit upon trivial suppositions and remote conjectures is a violation of your oath and an offense of great magnitude against the interests of society, directly tending to the disregard of the obligation of the judicial oath and countenancing a disparagement of justice and the encouragement of

malefactors. On the other hand, the jury ought not to condemn unless the evidence removes from your minds all reasonable doubt as to the guilt of the accused and you would venture to act upon it in a matter of the highest concern or importance in your own interest.

You will be justified and are required to consider a reasonable doubt as existing if the material facts, without which guilt can not be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always obtainable; from the nature of things, reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt and satisfies the mind to a reasonable certainty, a mere captious, or ingenious, or artificial doubt is of no avail. If a consideration of all the evidence satisfies you of the defendant's guilt, you will return a verdict of guilty; if you are not so satisfied, but a reasonable doubt or uncertainty as to the guilt of the defendant exists in your minds, it is your duty to acquit the defendant.

Whether or not the proof of the guilt is established beyond a reasonable doubt need not necessarily be shown by the greater number of witnesses, but may be determined by the jury by the greater weight of the evidence which convinces the jury of guilt beyond a reasonable doubt, the degree of evidence required in criminal cases. If your judgment so demands, you may conclude that the guilt of the defendant is established beyond a reasonable doubt, notwithstanding a less number of witnesses may have given their testimony on one side or the other. A reasonable doubt should not be made to rest upon a limited number of witnesses so long as the jury believe from the evidence that the guilt of the defendant is made to appear beyond a reasonable doubt.

7. *Duty of jurors to confer with each other.* It is the duty of the jurors to confer with each other to give careful consideration to the views which may be expressed by any of you while you are considering your verdict. A juror should not turn a deaf ear to the views of his fellow juror or jurors and without listen-

ing to arguments or reasons advanced by a fellow juror absolutely stand by his own opinion in the matter, regardless of what may be said by other jurors. It must be the object of all of you to arrive at a common conclusion and to that end you should deliberate together with calmness and be considerate of each other's views.¹

8. *Credibility of witnesses*—*A full statement as to.* The jury in considering the credibility of witnesses should consider their interest in the liberty of the accused, their opportunity to see and know the facts, the consistency of their testimony with all the facts and circumstances appearing in the case.

The credibility of the witnesses is within the sole discretion of the jury. In determining this question, you should use your common sense and best judgment. It is permissible and customary for the court to direct the attention of the jury to certain recognized tests which may or may not be applied in the discretion of the jury. You can not look into men's minds and discover whether they are telling the truth or falsehood, although you may look to and consider their appearance and demeanor upon the witness stand. You may judge from outward appearances, by the reasonableness of the testimony under all the circumstances of the case, and by conflicting statements or partial admissions or denials, if these suggest to your minds the truth or falsity of any testimony that may be given.

When two or more witnesses testify to radically different statements or to statements which partially harmonize and partially disagree, the sanctity of the oath may be unavailing and the jury are then called upon to determine which one was most likely to falsify. When there is conflict between the testimony of witnesses, the jury may or may not give the preference to the testimony of a witness or witnesses who have the least inducement from interest in the result of the verdict or from other motives to testify falsely. And when there is conflict between the testimony of witnesses, you may consider whether one or the other is corroborated by another witness who is wholly

¹ Davis v. State, 63 O. S. 173, 174.

interest of a witness to avoid a conviction of the defendant on trial, if any such desire or interest you may believe any witness to have had. Or, you may consider whether a witness has or has not a desire to secure a conviction for any reason other than an honest desire to bring a person charged with crime to justice. When there is sharp conflict you may consider whether a witness is or is not consistent in all his statements; whether or not anything connected with his statements supports or fails to support his testimony. You may consider the relation which each witness bears to the case, his means of information, fallibility or infallibility of memory; possibility of mistake in repetitions of conversation; or the likelihood or want of likelihood of adding to or subtracting from a conversation; unity of interest; motives, if any, that might lead a witness to swear falsely or otherwise; whether the motives for relating the facts testified to are wholly to bring a guilty person to justice or to enable a guilty man to escape; or whether his sole motive was to tell the truth without regard to consequences; whether or not any witness was in a situation that might tend to make him warp his evidence, or whether he was so situated that he had no reason to testify falsely. You may consider the probability or the improbability of the truth of the statements made by a witness. You need not believe the statements of a witness merely because he made them; you may believe a part or disbelieve a part. The fact that a witness is jointly indicted for the same offense with the defendant, and for which the defendant is on trial, may be considered by you in fixing the credit you will give to the testimony of such witness.

9. *Same—The dictagraph.* In connection with the subject of credibility of witnesses, the court may appropriately speak of the dictagraph which has made its first appearance in a court of justice. You have heard the testimony of its inventor and of the other witnesses concerning its use and operation in the communication of the human voice from one room to another. Counsel in the case entered into an agreement to let Exhibit L, which is the stenographic transcript of the conversations which

the witness Waleutt heard, go in as the testimony of the stenographer, which was read by the witness to the jury. The court permitted this testimony to be admitted in evidence to be considered by the jury in connection with all the other evidence in determining the credibility of witnesses and the guilt or innocence of the defendant.

10. *Criminal charges against witnesses.* Some testimony has been admitted concerning criminal charges made against a witness who has testified in this case. The law permits evidence to be introduced of a conviction of a witness of a felony, that is, an offense punishable by imprisonment in the penitentiary, to be considered by the jury on the question of credibility for whatever it is worth in the estimation of the jury. The jury will consider all of the evidence on this matter, the oral testimony of witness as well as the record offered in evidence.

11. *Reputation of defendant for honesty and integrity.* Testimony has been introduced touching the reputation of the defendant for honesty and integrity and also as to his character. A person's reputation for honesty and integrity is established by what his neighbors and the persons with whom he generally associates in a community generally say of him in this regard or it may be established by the fact that nothing has been said derogatory thereto. If people generally say he is dishonest, that would make his reputation for honesty and integrity bad. On the other hand, if a man's associates in a community say nothing whatever about him as to his honesty and integrity, that fact of itself would be evidence that his reputation for honesty and integrity is good. The reputation of a person for honesty and integrity must appear to be general in a community where he lives or in a community where he may temporarily reside for a sufficient length of time to acquire a general reputation. The general reputation must appear from what people in general say of him in the community.

The character of a man is what he actually is and not what people may say of him. Testimony has been offered here touching the character of the defendant for honesty and integrity.

This court has permitted this testimony to be offered for the consideration of the jury in connection with all the other evidence in the case for whatever bearing it may have in the minds of the jury touching the charges made by the indictment herein against the defendant.

12. *Law as to bribery.* As the indictment charges that the defendant, D., aided and abetted one A. in the crime of soliciting and accepting a bribe to influence him in his official action as a member of the Senate of the Ohio General Assembly, it will be necessary for the court to instruct the jury as to the law concerning the charge made against A. The statute of Ohio under which this indictment is preferred, section 12,823, reads as follows:

“Whoever being a member of the General Assembly or a state or other officer, * * * agent or employe of the state, either before or after his election, qualification, appointment or employment, solicits or accepts any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment in a matter pending, or that might legally come before him,” is guilty of the crime known as bribery.

The jury will bear in mind that the crime charged against A. is that of both the solicitation and acceptance of money to influence him in his official capacity. The jury will understand that it is a crime to solicit any valuable thing to influence his official action and that it is also a distinct and separate crime to accept any valuable thing to influence his official action; and that the said A. is charged with both these crimes and that the defendant D. is charged with aiding and abetting the said A. in the commission of both these crimes.

Before you can find the defendant guilty of the crime charged, you must first be satisfied beyond a reasonable doubt of the existence of the following essential facts: (Omitted.)

13. *Same—To solicit a bribe.* To solicit any valuable thing by a member of the General Assembly to influence him in respect to this official duty, imports an initial, active and wrongful effort

by such person. A charge of solicitation of any valuable thing to influence a defendant in respect to his official duty as a member of the General Assembly or to influence his action, vote, opinion or judgment, as contemplated by the statute, involves the idea of a mental attitude on the part of a defendant that he might be influenced in his official capacity.

To warrant the finding by the jury that A. solicited a bribe from H., you must find that in a conversation between H. and A., the latter used language which the jury believes was intended to be a solicitation by said A. of money to influence his official action, vote or judgment; or you must find that the defendant was authorized to solicit money for or on behalf of A. and that D. did so solicit money from H. for A. and to influence his official action and duty; or you must find that D. solicited money for A. to influence his official duty and action which was ratified and approved by said A. with an intent and purpose to influence his official action.

If you find that the said A. accepted money from H. or S. with intent and purpose of influencing his official action, vote, opinion, or judgment on the bill mentioned in the indictment, that said bill was pending and might come before him, then you would be warranted in concluding that said A. was guilty of accepting a bribe as charged in the indictment.

In determining whether A. solicited a bribe, or whether D. aided and abetted in the solicitation thereof, the jury will look to the conversations, if any, had between these parties, and determine therefrom whether said A. intended to solicit money from H. to influence him, A., in his official capacity as a member of the General Assembly by the receipt of some valuable thing from or through H.

It must be found by you that the language used by A. or by D. acting for and on behalf of A. in the matter, disclosed a purpose and intent to secure some valuable thing that he, A., might be influenced thereby in his official action.

14. *Same—To influence official duty.* It need not be shown that A. would be influenced in a particular way; the essential

thing is, that you find that A. made such statements to H. or S. as showed that he solicited, or requested, the payment of money, or accepted money, to influence him in his official duty in some way concerning the bill described in the indictment. But the court states to the jury that the forming and expressing of an opinion or judgment in favor of the bill in question, or the voting for the bill, were not all the acts that the defendant as a member of the Senate of the Ohio General Assembly could officially do in relation to the same. As a member of the legislature, it was competent for the said A. to ask or induce other members to vote for the bill, to ask other members of the committee in whose hands it was to vote to put it on its passage and to collect facts and reasons for the passage of the bill. That would be official action, official duty. As a member of the legislature the said A. had no right or authority under the bribery law, or any other law appertaining to his official position, to solicit or ask from any one, or to invite any one, to give or pay him any money, either by himself or by and through any person acting for and on his behalf in that matter. Whatever he did or was intending to do on those lines and in respect to the bill mentioned in the indictment, he was bound to do as the representative of the public, and he had no right to be influenced by any valuable or beneficial thing, except his salary, which was provided by law.

15. *Same*—*The bribe need not be the only consideration to influence.* It is not incumbent upon the state in making out its case that it shall show that the said A. solicited or accepted the money, if any was so solicited or accepted by him, that it was to be the only consideration that was to influence him in respect to his official duty or his action, vote, opinion or judgment relative to the bill. He may have been influenced by his own convictions concerning the bill to support it. The law does not require the state to prove that the solicitation, request or invitation for the money or the acceptance thereof was to be the sole inducement to any action that the said A. might take on any vote that he might cast or any opinion or judgment that he might

form or express. It is essential, however, that it shall be made to appear by the evidence that at the time of the alleged solicitation or acceptance of the money by said A., or it must be made to appear in some other way, that the said A. solicited and accepted the money with the intent and purpose of influencing his official action as a member of the legislature, either in his vote, opinion or judgment, or with the intent and purpose of enabling said A. to exert official action in respect to the bill described in the indictment.

16. *The intent.* In determining the intent of the said A., the jury may consider the evidence as to the alleged conversations had between the said A. and H., or between the said H. and the defendant D. in respect to this transaction when the alleged solicitation or acceptance of the money is said to have taken place, provided, however, that you find under the instructions which the court gives you at another place, beyond a reasonable doubt that the defendant was an aider and abettor in the crime charged against the said A

16a. *Jury the sole judges of meaning of language used.* The jury are instructed that you are the final arbiters as to the meaning of the language claimed to have been used in the alleged conversations had by and between the said H., A. and the defendant. You will decide whether the language claimed to have been used between the parties in these alleged conversations bears a construction that it was intended by the said A. or the said D. as a solicitation of a bribe to influence the said A. in his official action, or whether the language used by the said A. and the said D. was in respect to the receipt of the money as claimed by the state, intended by the said A. and the said D. to be a solicitation of or an acceptance of a bribe to influence the said A. in his official action as a member of the legislature, or of any committee thereof, or to influence his action, vote, opinion, or judgment as such member, or to influence his action as such member in securing favorable action on the part of other members of the legislature or members of a committee thereof. What is meant by the language is a question for your solution. Apply

your intelligence and common sense in deciding it in the light of all the facts and circumstances disclosed by the evidence and the law given you by the court in these instructions.

If the jury are satisfied beyond a reasonable doubt that A. either solicited or accepted money with intent and purpose to influence his official action, you will then proceed to determine whether defendant was an aider and abettor in either or both of said crimes.

16b. *Law as to aider and abettor.* The court will now instruct the jury concerning the law as to an aider and abettor to crime.

The statute, section 12380, provides:

“Whoever aids, abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender.”

That is, if A. either solicited or accepted a bribe, or both, and D. aided and abetted him in the acts, either or both of them, or procured A. to commit the same, he is guilty in the same manner as A. is, if you find that the latter is guilty as charged.

A person may in law be guilty of aiding and abetting another in the commission of a crime or crimes charged by an indictment, either by a plan or conspiracy previously formed for that purpose, or by joint participation by overt acts done or committed by the parties.

17. *Conspiracy between defendants and others to obtain money.* If the jury believe from the evidence that A., C., H. and others as members of the committee of the Senate on insurance, or as members of the legislature had formulated a plan or conspiracy to obtain money from persons interested in bills introduced in the Senate and referred to said committee to influence them as such members of such committees, or as members of the legislature and that said persons had associated with them defendant to act with them, and on their behalf, in furtherance of such plan or conspiracy, then the court charges the jury that the acts or declarations of each and all of such persons done and made in pursuance of such conspiracy, if you find there was one, are to be considered as the acts of each and all of said persons in pursuance of such conspiracy.

If the jury are satisfied that such a conspiracy was formed by said persons, and that the acts and declarations of each or all of said persons as shown by the evidence in this case, were done, and made, in furtherance of such conspiracy, then such acts and declarations done and made by such persons may be considered by you in determining the guilt or innocence of A. and D. of the crime or crimes charged against them in the indictment in this case, because what one of them may have said in pursuance of such a conspiracy is binding on each and all of the others. And if the jury find from the evidence that D. aided and abetted A. in the commission of the crime or crimes charged against him in the indictment against him, in furtherance of such conspiracy, then your verdict should be one of guilty against the defendant.

If, on the other hand, the jury should find that the parties named had not formed a plan or entered into a conspiracy such as the court has just mentioned and explained, your attention will next be directed to another claim made by the state in this case.

18. *Entrapment into crime—Status of those participating therein.* In determining the guilt or innocence of A. of the crime of solicitation or acceptance of money to influence his official action, vote, opinion or judgment, and of defendant, D., as an aider and abettor of either or both of said crimes, the court will now charge you as to the law applicable to the part taken in the transaction involved in the case by the witnesses who have testified on behalf of the state, who have acted in the capacity of detectives in the investigation of alleged bribery on the part of members of the Ohio Legislature.

Any person or persons who have reasonable grounds of belief or suspicion that members of the legislature have been engaged, or are engaged in the criminal practice of soliciting and accepting bribes to influence official action, have the right to adopt means and methods to detect persons suspected of being engaged in such criminal practices, and in pursuance of that purpose they may secure the services of persons as detectives in order to detect persons believed to be guilty of such practices.

The law is, gentlemen, that the duty of a legislator can not be considered obligatory primarily for individual or personal benefit, but is solely and entirely for the benefit of the State and the whole people of the State.

In considering the question of public policy, there is, gentlemen, in law a clear distinction between measures used to entrap a person into a crime in order to aid in the detection of some corrupt private purpose, and artifice used to detect persons suspected of being engaged in the solicitation and acceptance of bribes by public officers which vitally affect the public welfare.

It is the law that no person, or class of persons, nor can any public official be held criminally responsible for any act which they may do by way of entrapment of persons who are public officials believed and suspected of being engaged in the criminal practice of soliciting and acceptance of money to influence official action.

A prosecuting attorney whose attention has been called to such alleged criminal practices is not acting outside the pale of the law in rendering assistance in the discovery of such alleged criminal practices.

So the court charges the jury that if it appears from the evidence in this case that there was a belief and suspicion on the part of persons engaged in the investigation of the members of the legislature concerning the alleged criminal practices above mentioned, and that the defendant, who was sergeant-at-arms of the Senate, upon whom certain duties were imposed by law, entered into a plan or conspiracy with the detectives, who have testified in this case, to have members of the Legislature of Ohio solicit and accept bribes to influence their official action as such members, and you find from the evidence that the defendant, D., was lured into acts by detectives who proposed to him a scheme with reference to the senate bill, to have such members solicit or accept money to influence their official action, which they, the detectives, had no intention to carry out, that fact can not be urged as a defense by the defendant in this case.

19. *Defendant may be guilty, though entrapped.* If the defendant had no knowledge of the deception by the detectives,

but entered into the scheme proposed by them, believing it to be a genuine plan or scheme, and if the defendant did any act or acts in furtherance of such plan or conspiracy, and aided and abetted A. in the solicitation and acceptance of money from H., to influence his, A.'s, official action, and that said A. did solicit or accept said money to influence his official action, then the fact, if it is a fact, that both D. and A. were lured into the act will not excuse them from responsibility or liability under the law for their act of soliciting or acceptance of bribes, or of aiding and abetting the same.

19a. *Detectives not aiders and abettors.* If the jury believe that the persons making the investigation had reason to believe or suspicion that the defendant and the members of the legislature were engaged in the criminal practices mentioned, and that H., S., B. and B. entered into a combination with the defendant, D., who was an officer of the legislature, to entrap members of the legislature, to aid the investigation and to detect persons suspected of being engaged in criminal conduct or practice, and they continued to act in such capacity in good faith until the persons suspected had been arrested, the detectives are not aiders or abettors, and the testimony of the detectives is not to be considered as the testimony of co-conspirators, as to which there are special rules which govern the jury in the consideration of the testimony.

If you find that the detectives and the defendant did enter into the plan just mentioned, and that defendant, D., believing the transaction to be real and genuine, did any act, delivered any message or had any communication with A. which in any wise contributed or aided or abetted said A. to solicit or accept money, and that A. did solicit or did accept money, and that the defendant did aid and abet the solicitation or acceptance of money to influence his official action, then the jury would be justified in finding that the defendant, D., was actuated by a criminal intent to aid said A. in the solicitation or acceptance of money and to influence his official action as a member of the general assembly.

20. *Immunity of detectives—Entrapping.* Under the law as it is given to you by the court the jury is instructed that there is no question involved in this case concerning the immunity of any witness who has testified in this case provided the jury find, as the court has instructed you, that those who were making investigations in legislative criminal practices therein believed or suspicioned that there was being practiced certain criminal practices by the members. If the persons making such investigations, acting upon such belief and suspicion, honestly pursued the course shown by the evidence for the purpose of detecting those guilty of such criminal practices, and if they did cause them to commit the crime of soliciting and accepting bribes, they are not in such case guilty of the commission of any crime, and they need no immunity.

21. *Final instruction to jury as to their duty and verdict.* Now, gentlemen, the court has given you the rules of law applicable to the evidence in this case. You have taken an oath to follow these instructions, and in order to know what the law is and to intelligently apply the law to facts which you find you should, if you desire, read these instructions in your jury room.

It is your duty to uphold the majesty of the law by applying it to the evidence in this case, without fear or favor.

Banish all sentiment, feeling, sympathy or prejudice, or all suggestions made in argument to arouse your sympathies or prejudices, from your minds, and be true to your oath and do not disregard the law as given you by the court.

The jury have nothing to do with mercy; the courts, pardon boards and the governor are the only persons who are authorized by law to temper justice with mercy, and the legislature has made what it deems proper provision in this matter.

The jury deals only with the facts in the light of the law given you by the court; that and nothing more; that and nothing less.

Now, gentlemen, if your honest and deliberate judgment leads you to believe that the defendant is guilty of aiding and abetting A. of either in soliciting or accepting a bribe, let your verdict of guilty be rendered accordingly.

If you have a reasonable doubt of the guilt of the defendant, let your verdict of not guilty be rendered, accordingly.¹

¹ *State v. Diegle*, Franklin County Common Pleas, Kinkead, J. As to entrapment, see *State v. Diegle*, 11 N. P. (N.S.) 593, 21 L. D. 557; charge affirmed, *State v. Diegle*, 14 C. C. (N.S.) 289, 33 C. D. 82, 86 O. S. 310.

Sec. 1582. Solicitation of a bribe.

1. *Statute and essentials of crime.*
2. *Solicitation—What constitutes.*
3. *Same—Intent.*
4. *Jury to determine meaning of language used.*
5. *Intent and motive—Consideration of other alleged solicitations.*
6. *Declarations of parties—Received with caution.*

1. *Statute and essentials of crime.* The court will now instruct the jury concerning the crime of solicitation of a bribe, and instruct you concerning your duties in the matter.

That part of the General Code, sec. 12,823, of this state, making the act charged in the indictment a crime, reads as follows:

“Whoever, being a member of the General Assembly, either before or after his election, qualification, appointment or employment, solicits * * * any valuable or beneficial thing to influence him with respect to his official duty, or to influence his action, vote, opinion or judgment, in a matter pending, or that might legally come before him,” is guilty of the crime of solicitation of a bribe.

Before the jury can find the defendant guilty it must be satisfied beyond a reasonable doubt of the following essential facts:

1. That defendant solicited a valuable thing of E.
2. That such solicitation was made somewhere in Franklin County, Ohio.
3. That such solicitation was corruptly made.
4. That it was made by defendant to influence him with respect to his official duty.
5. Or to influence his action, vote, opinion or judgment.
6. Or to influence some of his associate members of the General

Assembly in the performance of his official duty. 7. In a matter pending before him. 8. Or that might legally come before him.

To make out the charge in the indictment, the State is not obliged to prove that any money was paid, accepted or received by the defendant.

2. *Solicitation—What constitutes.* To solicit any valuable thing by a member of the General Assembly to influence him with respect to his official duty, imports an initial, active and wrongful effort by such person. The charge of solicitation of any valuable thing to influence the defendant in respect to his official duty as a member of the general assembly, or to influence his action, vote, opinion or judgment, as contemplated by the statute involves the idea of a mental attitude on the part of the defendant that he might be influenced in his official capacity by the acceptance of some valuable thing; or that he may, could or would be so influenced.

Before the jury can find a verdict of guilty in this case, it must find from the evidence that the defendant used language in the conversation alleged to have been had with E. from which you may find, considering all the evidence in the case, by which the defendant intended to solicit money to influence him in his official capacity as a member of the General Assembly by the receipt of some valuable thing from or through E. It must be found by you that the language alleged to have been used by the defendant disclosed a purpose and intent to secure some valuable thing that he might be influenced thereby. It need not be shown that the defendant would be influenced in a particular way; the essential is, that whatever you find the defendant to have stated to E., it should show that he solicited or requested the payment of money to influence him in his official duty in some way concerning the bill described in the indictment. To make out the charge in the indictment it is not essential that the State show that defendant wanted the money for his own use, or that he intended to use it for his own purposes, but the jury is instructed that the forming and expressing of an opinion

or judgment in favor of the bill in question, or the voting for the bill, were not all the acts that the defendant, as a member of the house of representatives, could officially do, in relation to it. As a member of the legislature it was competent for the defendant to ask, to induce other members to vote for the bill, or to ask other members of the committee in whose hands it was to vote to put it on its passage, and to collect facts and reasons for the passage of the bill. This would constitute official action and be within official duty. As a member of the legislature the defendant had no right or authority, under the bribery law, or any other law appertaining to his official position, to solicit or ask from anyone, or to invite anyone to give or pay him any money, either for himself, or for any other member of the legislature, in consideration for the exertion by him of any of the official actions mentioned in the statute quoted to you. The influence of the defendant as a member of the general assembly over the official actions of his colleagues is itself a part of his own official action and duty. (73 Minn. 150.)

Whatever he did, or was intending to do, on these lines and in respect to the bill mentioned in the indictment, he was bound to do as the representative of the public, and he had no right to be influenced by any valuable or beneficial thing, except his salary, which was provided for by law. That was his position. That was his obligation.

It is not incumbent upon the state, in making out its case, that it shall show that the solicitation of money, if any was made, was to be the only consideration that was to influence the defendant in respect to his official duty, or his action, vote, opinion or judgment, relative to the bill. He may have been influenced by his own convictions concerning the bill to support it. The law does not require the state to prove that the solicitation, request or invitation for the money was to be the sole inducement to any action that defendant might take, or any vote that he might cast, or any opinion or judgment that he might form or express.

3. *Same—Intent.* It is essential that it shall be made to appear by the evidence that at the time of the alleged solicitation of money, or in some other way, that the defendant made the solicitation with the intent and purpose of influencing his official action as a member of the legislature, either in his vote, opinion or judgment, or with the intent and purpose of enabling the defendant to exert official action in influencing other members of the legislature in their official actions in respect to the judicial bill.

4. *Jury to determine meaning of language used.* The court instructs the jury that it is the final arbiter of the meaning of the language claimed to have been used by the defendant at the time of the alleged solicitation of a bribe; it will determine whether the language bears a construction that it was intended by the defendant as a solicitation of a bribe to influence him in his official action, as a member of the legislature, or of any committee thereof, or to influence his action, vote, opinion or judgment as such member, or to influence his action as such member in securing favorable action on the part of other members of the legislature or members of a committee thereof. What is meant by the language is a question for your solution. Apply your intelligence and common sense in deciding it in the light of all of the facts and circumstances by the evidence and the law given you by the court in these instructions.

5. *Intent and motive—Consideration of other alleged solicitations.* In determining the intent of the defendant, the jury may consider the evidence as to the conversations between defendant and E. when the solicitation is alleged to have been made, you may consider the testimony as to other alleged solicitation of bribes by the defendant, if any you find from the evidence to have been made. The court instructs and cautions the jury that it may only consider the evidence touching the alleged solicitation of money at other times than charged in the indictment, for the sole purpose of enabling you to determine the intent of the defendant at the time at which it is claimed he solicited a bribe of E.

6. *Declarations of parties, received with caution.* The jury is instructed that declarations and statements of persons should always be received by the triers of a case with care and caution, for the reason that the party making them may not have clearly expressed his meaning, or the witnesses who testify as to them may have misunderstood him, and it may be that the witnesses, by unintentionally altering a few of the expressions really used, give effect to the statement completely at variance with what the party did actually say. But if the jury is satisfied that the declarations and statements have been made and correctly given in evidence, they may in the opinion of the jury afford strong and convincing evidence and proof, for the reason that parties are not supposed to make declarations against themselves and their interest. It is the province of the jury to weigh such evidence and to give it such consideration to which it is entitled in the opinion of the jury in view of all the evidence in the case.

7. *Admonitions to jury.* Gentlemen of the jury, it is the solemn duty of the court, before this case is finally submitted to you, to urge that you shall disregard all appeals made to you by counsel as to matters which are outside the record in this case. The court instructs the jury that you must pay no attention to these appeals.

It would be strange if, in a case like this, the anxiety and zeal of the attorneys should not present to your minds topics which are outside the evidence and which have no pertinence to the issue on trial and no appropriateness in the consideration of upright, law-respecting and oath-respecting jurors. Such incidents are so usual in criminal trials that it almost becomes embarrassing for the court to undertake to correct them, and yet they are gravely injurious to the cause of law and justice, and jurors should leave no stain on their oath by being in the slightest degree influenced by them. I allude to the appeals to the sympathy and commiseration of the jury, reference to the penalty of the law with which the jury have no concern, and would violate your duty if you even considered them.

The attorneys engaged in the trial of this case are officers of this court, and it is their duty to assist the court and jury in

the administration of justice. They may call your attention to the evidence, they may present it in such way as to best suit their respective sides, and it is your privilege and duty to listen to and consider their reasons and argument for whatever assistance it may be to you in the consideration of the evidence in this case. But, gentlemen, you must consider only the evidence which the court has admitted, and the law as given you in these instructions, and allow no reference to outside matters to influence your verdict in the slightest degree.

Pay no attention to what the public press may have said about this case, if anything, nor to any public interest that there may be in this case. When you have acted conscientiously, honestly and solely upon the evidence and the law, you need have no concern as to what anyone may say or think about your verdict, whether it be one of guilty or of not guilty. In a case like this you have a stern duty to perform, and in its performance you have no right to be influenced by appeals to the tender emotions of your human nature, or by sympathy for anybody, or by reference to any outside matters.

Certainty, regularity and firmness in the administration of the law by courts and jurors are of the highest importance.

I say this, not to impress you with anything save this, and that is the solemn and exalted public duty for which you have been selected and designated by the machinery of the law. The duty is as much due to the defendant as to the public. You must answer the question whether the defendant is innocent or guilty upon the evidence as it was given here from the witness chair, and according to the law as it is given you in this charge. You simply pronounce upon the question whether defendant is innocent or guilty. If he is guilty, say so; he is responsible for it, and not you. If he is innocent, then your verdict should be a shield to him at this time.¹

¹ *State v. Nye*, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1583. Reputation of accusing witnesses.

Testimony has been introduced touching the reputation of E. A. C. and S. H. for truth and veracity.

A person's reputation for truth is established by what his neighbors and the persons with whom he generally associates in a community generally say of him in this regard. If they generally say he is untruthful, that makes his general reputation for truth bad. On the other hand, if a man's neighbors and associates in a community say nothing whatever about him as to his truthfulness, that fact of itself is evidence that his general reputation for truth is good.¹

The reputation of a person for truth must appear to be general in a community where he lives, or in a community where he may temporarily reside for a sufficient length of time to acquire a general reputation. The general reputation must appear from what people in general say of him in the community, and should not be limited to a particular class of persons, but depends upon what is generally said of him, or by the fact that people generally do not discredit him.

Whether or not the general reputation of these witnesses has been successfully impeached is for the jury to determine. You will consider all the testimony offered on this point, that produced by the defense to impeach and that produced by the state to support the witnesses. The credibility of all these witnesses and the weight to be attached to their testimony is within the exclusive province of the jury. You may consider the standing of the witnesses offered, their opportunity to know the people with whom the witnesses sought to be impeached generally mingle in the community where they live; whether the testimony shows that the people with whom the witnesses associated generally discredit the witnesses for truth, or whether only a few of such persons discredit them; or whether it appears that the reputation of such witnesses for truth was not generally questioned.

The jury may also consider the relation which the impeaching witnesses sustain to the prosecution or the defense, or to the defendant, or to the witnesses sought to be impeached.

The jury may consider also the interest which the impeaching witnesses may have in the defense of this case or other alleged

acts of solicitation of bribes testified to in this case, if the jury believe any witness or witnesses have such interest.

If the jury should be of the opinion that the general reputation of either or both of the witnesses mentioned for truth and veracity in the community where they live or temporarily reside, has been successfully impeached, then you may in your discretion disregard their testimony as being unworthy of belief, either a part of it or all of it, as your judgment demands. But, notwithstanding the fact that you may believe from the evidence that the general reputation of such witness or witnesses for truth has been successfully impeached, you may still believe their testimony, a part or all of it, if your judgment suggests that you should give credence to it. In determining the weight to be given to the testimony of the witnesses sought to be impeached, you may consider whether it has or has not been corroborated by other witnesses or facts and circumstances appearing in the case.

To warrant the jury in coming to the conclusion that the reputation of such witness or witnesses has been successfully impeached, you must find that the bad reputation is general in the community where he lives, or that it is generally bad in a community where he has temporarily resided for a sufficient length of time to have acquired a general reputation for truth; that is, that it is generally so reported and considered to be bad in the community; and if it has not been thus impeached, the jury should not reject it, but should give it consideration and weight, applying to it the ordinary tests of credibility.

A witness may be impeached by showing that he has made other and different statements out of court from those made before you on the trial, as to any material matter. And if the jury believe from the evidence that any witness has made statements at another time and place at variance with his evidence in this case, regarding any material matter testified to by him, then it is the province of the jury to determine to what extent this fact tends to impeach, either his memory or his credibility, or detracts from the weight to be given his testimony. It is

entirely a question for the jury as to what effect it will have upon you here. It is not whether the statement alleged to have been made outside is true, but whether the testimony given on trial is true. In determining the question you will take into consideration all of the facts and circumstances, applying the tests in determining the credibility of witnesses. The contradiction must be as to a material matter, and its materiality is to be measured by you by the charge of solicitation of a bribe, contained in the indictment. The question of fact which you are to determine in this case is whether the defendant corruptly solicited a bribe, with intent to influence his official duty.²

¹ Sackett's (Brickwood), Instructions, sec. 373, 28 Ind. 206, 68 Ind. 238, 132 Ind. 254.

² State v. Nye, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1584. Bribery of city official—Form of complete charge in a criminal case—Embracing preliminary questions.

1. *Plea of not guilty.*
2. *Presumption of innocence.*
3. *Reasonable doubt.*
4. *Consideration of unanswered questions.*
5. *Refusal to answer incriminatory questions.*
6. *Negative testimony.*
7. *Credibility of witnesses.*
8. *Pleas of guilty and flight.*
9. *Testimony of accomplices or aiders and abettors.*
10. *Evidence as to admissions.*
11. *Impeachment.*
12. *Testimony of an accomplice offered immunity.*
13. *Specific charges in indictment.*
14. *Law as to bribery.*
15. *Intent.*
16. *Corpus delicti—Must be proved.*
17. *Direct and circumstantial evidence.*
18. *Extrajudicial admission must be corroborated.*

19. *Claim as to conspiracy.*

20. *The law as to conspiracy.*

The indictment in this case charges the defendant with the crime of bribery.

1. *Plea of not guilty.* The defendant has entered a plea of not guilty to the charge made against him by the indictment.

This plea forms the issues to be tried, and presents the issues of fact which are now to be submitted to you for determination.

The burden of proving the defendant guilty of the charges made against him is upon the state, which must be established by the degree of proof or evidence, which is required by law in criminal cases, and which the court will presently explain to you.

2. *Presumption of innocence.* The law arbitrarily creates a presumption in favor of every one charged with a crime, that he is presumed to be innocent until he is proven guilty according to law. This simply means, gentlemen, that when you enter upon your deliberations in the consideration of the charges made against the defendant, and of the evidence offered by the state, and by the defendant, you shall proceed upon the theory, as well as upon the fact, that he is presumed to be innocent. The defendant is entitled to the benefit of this presumption from the time you begin to consider the evidence, and throughout the consideration of the case, and until, after weighing the testimony carefully according to the tests prescribed by law and explained to you by the court, you have reached the conclusion that this presumption has been overcome. That you may fully appreciate the full import of this rule, your attention will be further directed to its beneficent purposes. It is the purpose of the law that jurors, in approaching the consideration of charges made by an indictment, shall have their minds free and open, and that you shall not be prejudiced or influenced in the slightest degree by the fact that an indictment has been found against the defendant. The aim and purpose of this rule of law is, that jurors are to consider and be guided only by the evidence offered in the case. And the court places the injunction upon your consciences that neither your consciences nor your oaths shall

be tarnished by the slightest departure from your duty as the court has endeavored to explain it to you. If in your deliberations you should reach the conclusion that the evidence has overcome this legal presumption of innocence, then in further considering the testimony, with a view to determine whether the defendant is guilty or innocent of the charges made by the indictment, you must be guided and governed by another humane provision of law which prescribes that in criminal procedure, the degree of evidence which will govern and control jurors is that they shall be satisfied of the guilt of the accused beyond a "reasonable doubt," before you can find him guilty, and if not so satisfied, you should acquit him. It is not incumbent upon one charged with a crime, in order to prove his innocence, that he shall satisfy the jury of the existence of any material fact which, if true, would constitute a complete defense. It is sufficient if the evidence merely creates in the minds of the jurors a reasonable doubt of the existence or truth of material facts, in which case the defendant is entitled to be acquitted.

3. *Reasonable doubt.* So many forms and definitions have been given of a "reasonable doubt" that it would almost cause us to believe that there was some mystery about the term, or difficulty about its meaning. What we want is a practical, plain and sensible explanation. A reasonable doubt is an honest, reasonable uncertainty, such as may fairly and naturally arise in your minds, after having fairly, carefully and conscientiously considered all the evidence introduced upon the trial of this cause, when viewed in the light of all the facts and circumstances surrounding the same. It is a doubt founded upon a real, tangible, substantial basis. It is such a doubt as would cause a reasonable, prudent and considerate person to pause and hesitate to take action concerning matters affecting his own material interests, or in matters pertaining to the graver and more important affairs of life, or in transactions like the one involved in this case. A doubt is not reasonable if it rests upon or is founded upon a mere caprice, fancy or conjecture; it is unreasonable also if it arises in the mind of a juror by reason of his own per-

sonal feelings, passion or sentiment. A juror who acts upon such a doubt, or who creates a doubt in his own mind to avoid a disagreeable duty, violates the oath which he takes. If, after a careful and impartial consideration of all of the evidence in the case, you can say and feel that you have an abiding conviction of the guilt of the defendant, and you are fully satisfied beyond a reasonable doubt of the truth of the charge, then you are satisfied beyond a reasonable doubt. If, from all the evidence in the case, the jury have a reasonable doubt whether the defendant has been proven guilty, it is then your duty to find the defendant not guilty.

4. *Duty of jurors to deliberate and confer with each other.* The law, in constituting a jury of twelve men, thus contemplated that each and every one of you shall give your individual consideration of and judgment upon the evidence. The rules of law pertaining both to the essence of the crime, and the degree and rules of evidence, which are explained to you in these instructions, are necessarily binding upon the individual conscience and judgment of the members of the jury. It is the duty of each jurymen while you are deliberating upon your verdict to confer with your fellows and give careful consideration to the views which your fellow jurors may have to present upon the testimony in the case. A juror should not turn a deaf ear to the views of his fellows, and, without listening to their reasons and arguments, obstinately stand upon his own opinion in the matter, regardless of what may be said by the other jurymen. It must be the object of all of you to arrive at a common conclusion, and to that end you should deliberate together with calmness and be considerate of each other's views.¹

5. *Consideration of improper unanswered questions.* Some questions have been asked of witnesses which were not permitted by the court to be answered.

The fact that such questions have been asked, though not answered, should not be considered. You have no right to draw any inferences as to the purpose sought to be established by those propounding them, and you will not be justified in drawing any inferences therefrom.

¹ Davis v. State, 63 O. S. 173, 174.

6. *Refusal to answer incriminatory questions.* You are instructed, gentlemen, that under the constitution and law of Ohio, a witness has the right to refuse to answer questions the answers to which might tend to criminate him. If any witness has so refused to answer questions propounded to him, you have no right to draw any deductions therefrom, it being your duty to consider only the evidence given.

7. *Negative testimony.* It is the duty of the Court to instruct you concerning negative testimony as distinguished from affirmative testimony. Negative testimony is testimony that things were not done, or that a statement was not made, while affirmative testimony is testimony that a thing was done, or that a statement was made. It is a rule of law of evidence that the affirmative is to be preferred to the negative. Where under all the circumstances it appears to have been the duty of one to speak, and he does not speak, then his silence or failure to speak may be considered together with all the other evidence in arriving at your verdict. But on the other hand if, from all of the facts and circumstances in the case, you should be of the opinion that a witness or party was under no obligation or duty to speak, and he did not speak, his failure to speak in such case, should not be taken into account by you in the consideration of the evidence.

8. *Credibility of witnesses.* The credibility of each and all the witnesses who have testified in this case is left entirely to the jury. The weight and credit to be given to the testimony of witnesses is committed to your judgment. In determining this question, you may consider their intelligence, their manner and conduct on the witness stand, whether any witness showed zeal or feeling against or for either side; whether there was any reluctance on the part of any witness in testifying; whether a witness has an interest in the conviction of the accused, or an interest in his own liberty, or in the liberty of any other person. You may consider the relation that each witness bears to the case; his means of information; the interest, if any, he may have in the result; the motives,

if any, that might lead him to swear falsely, or otherwise; whether his motives for relating the facts testified to are wholly to bring a guilty person to justice, or to vent his wrath upon an innocent person; whether there was a corrupt motive on his part to testify for or against the defendant; or whether his sole motive was to tell the truth, without regard to consequences; whether or not any witness was in a situation that might tend to make him warp his evidence; or whether or not he was so situated that such witness or witnesses had no reason to testify falsely; whether or not they were induced to become a witness and testify in the case by any promise or hope of leniency or mitigation of punishment in case they testified; or whether any witness was induced to testify through promise or hope of leniency to any one else in whom they are interested by relation or otherwise; or whether no such influences were brought to bear upon any witness. If you find from the evidence that any one of the witnesses is likely to be seriously affected by reason of the facts and circumstances which you may find to be connected with and a part of the transaction involved in this case, if you reach any such conclusion, you may consider that fact, if you find the fact to be, in determining the weight or credit of any witness. You may consider the probability or improbability of the truth of the statements made by any witness. You are not obliged to believe the statements of any witness merely because he made them; and you may, if your judgement dictates, believe part and disbelieve part of any witness's testimony. These and many other matters might be called to your attention whereby you are to test the evidence. Weighing the testimony by these and other tests you may have, you will determine the effect to be given it, and you will give the testimony such credit as it is entitled to; and if you determine from all the evidence adduced at the trial, under the charge of the Court, that the evidence has established, beyond a reasonable doubt, the guilt of the accused, it is your duty to say so in your verdict. But if the evidence has not so convinced you, your duty requires you to find the defendant not guilty.

9. *Pleas of guilty and flight.* Questions have been asked of witnesses concerning indictments preferred against them and of pleas of guilty thereto made by them, and of flight before such indictments were found. The Court permitted these questions to be answered, and their answers submitted to you to be weighed and considered by you in determining the credibility of such witnesses. The Court especially charges and cautions you that you are to consider evidence touching the flight of any witness only on the question of credibility, and not as having any bearing upon the commission of the crime charged against the defendant excepting as the testimony of such witness, according to the credit which you may attach to it, may tend to prove the innocence or guilt of the defendant.

10. *Testimony of accomplices or aiders and abettors. How to be considered.* In view of the testimony of some of the witnesses who have appeared and given evidence before you, it is incumbent upon the Court to instruct you in reference to your duty in the consideration of their testimony. If you should find, as charged in this case, that there was a conspiracy to defraud the City of Columbus, or to obtain the corrupt action of the members of the Board of Public Service by bribing them, and that the defendant and others participated in such conspiracy, and if any of the persons, whom you so find to be members of said conspiracy and who are, in your opinion, jointly responsible as aiders and abettors in the alleged crime of bribery, claimed to have been committed in pursuance of said conspiracy and as a part thereof, have testified in this trial, then you are instructed that you will be governed by the following injunctions and instructions, which the Court now gives you.

One who participates in the commission of a crime, by aiding and abetting, though not directly participating in the crime, is, according to the law, an aider and abettor. Under ancient, or common law, such person was considered an "accomplice," which is synonymous with an aider and abettor, except that an accomplice meant a person who, not only aided and abetted

in the commission of a crime before its commission, but who committed acts in connection with the crime, subsequent to its commission. The term accomplice, as thus explained, is the term which I will use in these instructions. The fact that a witness was an accomplice, or an aider and abettor, if that is a fact, does not make him incompetent as a witness; the turpitude of his conduct does not disqualify him as a witness. The admission of an accomplice as a witness is said to be justified by the necessity of the case, but with the wisdom of the practice you are not concerned. The degree of credit which ought to be given to the testimony of a witness who has turned State's evidence is a matter exclusively within your province to decide. While the matter of credit to be given the testimony of an aider and abettor, or an accomplice, is within the sole province of the jury to determine, yet the law makes it the duty of the Court, within its discretion, to advise a jury not to convict one charged with a felony upon the testimony of an accomplice alone, and without corroboration. If you should entertain a reasonable doubt as to whether the defendant was a party to such a common scheme, design or conspiracy, of which the Court has spoken, then there would be no occasion for a consideration of the rules relating to the testimony of an accomplice, aider or abettor.

In obedience to this discretionary power thus vested in trial judges, I caution you to consider and scrutinize with care the testimony of any person, or persons, whom you are satisfied from all the evidence were participators and actors in the alleged conspiracy to defraud the city, or to obtain the corrupt municipal action of the Columbus Board of Public Service, and whom you are also satisfied from the evidence, acting under these instructions, were aiders and abettors, or accomplices, in the crime charged here, or in any crime charged to have been committed in pursuance of the alleged conspiracy, if you should find any such crime to have been committed, and that the defendant was a party thereto. I do not consider it within the province of the Court to name any witness or wit-

nesses, who come within the rule of evidence, instructions as to which the Court now gives you. It is within your province to observe the injunction of the Court now given you in respect to the testimony of any witness or witnesses whom you find come within the rule now given you.

If you should find from all the evidence that the defendant, and others who have appeared as witnesses in this case, were engaged in a common design and conspiracy to either defraud the city, or to corruptly obtain the official action of C., member of the Board of Public Service, and other members of the Board of Public Service of ———, and that the crime charged in this indictment, as well as other crimes of bribing other members of the said Board of Public Service, were committed by any of the persons whom you find, if you do so find, were engaged in the common design and conspiracy aforesaid, then you are instructed to apply the rule which the Court now gives you in the consideration of the testimony of any such person or persons. While I deem it to be my duty to caution you to scrutinize with care the testimony of any such witness, or witnesses, as come within the foregoing rules, still it is my duty at the same time to instruct you that the law is, that you may find the defendant guilty upon the testimony of any person or persons whom you may find to be an aider and abettor, or aiders and abettors, which you may find to be corroborated as to one or more material facts, notwithstanding his or her infamy and complicity in the crime or crimes alleged to have been committed in pursuance and as part of the conspiracy claimed to have been formed in the transaction under investigation in this case. And, acting within the power given me by the law of this state, I advise you not to convict the defendant upon the testimony of any witness or witnesses, whom you find to have been an accomplice, or an aider and abettor, unless you find that it is corroborated. You are instructed not to give credit to the testimony of such witness or witnesses unless it is corroborated by other evidence, either undisputed or well established facts or circumstances, or by the testimony of truth-

ful witnesses. The corroborative evidence must tend to confirm the testimony of an accomplice upon a point material to the issue, in the sense that it tends to prove the guilt of the defendant.

11. *Evidence as to admissions.* You are instructed, that the evidence of certain witnesses as to oral admissions or statements of defendant, alleged to have been made to them, should be viewed with scrutiny, and that in considering such testimony you will take into consideration the surrounding circumstances, and the situation and surroundings of the defendant, and the probability or improbability of his having made any such admissions or statements. It is simply the duty of the court to state that such evidence should be received by the jury with caution, but you must understand, that it is within the sole province of the jury to weigh such evidence and give it the consideration to which in your judgment it is entitled in view of all the other evidence in the case. It is to be viewed in the light of all the surrounding circumstances appearing in the evidence—the motives which may have induced it—its consistency with the other evidence; and the jury, without capriciously or causelessly accepting or rejecting any portion, may give credit to all or part, as you may find reason for believing, or you may reject all or part as you may find reason for disbelieving, in view of all the facts and circumstances proved in the case.

12. *Impeachment.* A person's reputation for truth is made by what his neighbors, acquaintances and associates generally say of him in this regard. If they generally say he is untruthful, that makes his general reputation for truth bad. On the other hand, if a man's neighbors and associates say nothing whatever about him as to his truthfulness, that fact of itself is evidence that his general reputation for truth is good.

Testimony of witnesses has been offered here touching the general reputation of N. A. C. for truth and veracity.

You are instructed that if the general reputation of C. for truth is successfully impeached, you would be warranted

in believing or disbelieving his testimony as you in your best judgment may determine. You are the judges of the credibility of the witnesses, and of the weight to be attached to the testimony of each of them. You are not bound to take testimony of any witness as absolutely true, and you are not to do so if you are satisfied from all the facts and circumstances, proven on the trial, that such witness is mistaken in the matter testified to by him or from any other reason his testimony is deemed by you to be untrue and unreliable. The effect of impeaching the witness goes only to the weight that should be given to his evidence. It is submitted to you better to enable you to determine in what light to estimate his testimony; but it should have no effect as to facts that you find to be established from evidence offered in the case. It does not impeach his right to be protected as fully as the right of any other person. The law as to its remedial arrangements is wholly impartial.

13. *Testimony of an accomplice offering immunity.* It has been for many years considered that a prosecuting attorney, or counsel for the state or government, had the right to promise an accomplice, (now legally designated as an aider and abettor by the statute of Ohio) that if he would give his testimony freely and truthfully, without prevarication, or fraud, he should be protected from prosecution, or whether any special favor should be shown, or immunity offered him.

Under the common law this right was conceded to the prosecuting officer, and as the common law as to crimes and criminal procedure is no part of the law of this state, there is now no legal right on the part of the prosecuting attorney to promise favors or offer immunity. But on his own responsibility he may assume to promise special favor or immunity to an accomplice, and he may make such recommendation in reference to the penalty to be assessed against such accomplice as he may deem necessary, but the Court is the final judge as to what shall be done in the matter. I deem it to be my duty to make this statement, that you may consider the propriety and effect of the making of promises of favor or immunity to an

accomplice, in connection with the weight which the jury shall give the testimony of any such witnesses who may have been promised favor or immunity, according to the instructions touching this matter.

14. *Specific charges in the indictment.* I come now to a consideration of the specific charge made by the indictment in this case against the defendant.

15. *The law as to bribery.* The law of this state, relating to and governing the charges made in the indictment, and which shall be your guide and authority, is as follows:

“Whoever corruptly gives * * * to any state, judicial or other officer, * * * either before or after his election, qualification, appointment, or employment, any valuable thing, to influence him in respect to his official duty, or to influence his action, vote, opinion, or judgment, in any matter pending, or that might legally come before him, * * * shall be imprisoned in the penitentiary or fined,” as provided by law, but with which penalty you have no concern, and should not consider.

This statute defines the crime known and designated as bribery.

Before you can find the defendant guilty of the charge made against him, you must be satisfied or find beyond a reasonable doubt the existence of each and all of the following facts and essential elements of the crime contained in the indictment: Omitted.

The law of Ohio is that in every city there shall be a department of public service which shall be administered by three or five directors, as fixed by ordinance or resolution of council.

The jury are instructed that by law it was one of the duties of said B., as a member of such board, to manage and supervise all public works, to supervise the improvement and repair of streets

You must find also that there was some occasion or call or necessity for the performance of some official duty by the said C. B. B., as such member of the board of public service; that is,

you must find that there was some matter pending before C. B. B. as such member, or that might legally come before him, which would require his action, vote, opinion or judgment at the time or about the time mentioned in the indictment.

The duty imposed by law upon the board of public service and upon the said C. B. B. as a member thereof, to manage and supervise the improvement and repair of streets, required as a matter of law that the said board of public service of the city of Columbus, and the duty by law was imposed upon C. B. B. as a member thereof, to receive bids and award, make and execute contracts for the improvement and repair of streets.

And if you find that there was pending before said board of public service, and said C. B. B. as a member thereof, at the time which the indictment charges defendant with having given said B. the sum of \$——, any matter relating to the improvement or repair of any street, or that any such matter might legally come before said B., and you further find that the defendant gave to said B., with the corrupt purpose and intent to influence his official action, or obtain his vote, opinion or judgment, the said sum of \$——, or other valuable thing, and that the said B. received the said sum of \$——, or other valuable thing, with the corrupt purpose and intent on his, B.'s, part to act in his official capacity, or to vote, give his opinion or exercise his judgment in some matter falling within his official duty, in a matter pending before him, as a member of said board, or touching a matter that might legally come before him, then it would be your duty to render a verdict of guilty against the defendant.

To corruptly give any valuable thing, means, in law, to give money or other valuable thing with intent to gain an advantage not consistent with official duty, and not consistent with the rights of others; it means something forbidden by law. Or again, to corruptly give anything means to give it dishonestly, or to bribe another, to obtain some action on the part of an official to incline him to act contrary to the known rules of honesty and integrity.

To warrant you in finding defendant guilty of the crime charged, you must not only be satisfied beyond a reasonable doubt that the defendant gave the money, and that said B. received the same, as above explained, but you must be satisfied beyond a reasonable doubt that the same was given and received with the corrupt purpose of causing said B. to act in his official capacity, as already explained, contrary to known rules of honesty and integrity.

16. *Intent.* You must find that the defendant corruptly gave B. the money with the intent to corruptly influence the official action of the said B.

Intent is an operation of the mind not usually proved by direct and positive evidence, but it may be inferred from the facts and circumstances appearing from the evidence.

17. *Corpus delicti*—*Must be proved.* I have stated to the jury that before you can find the defendant guilty of the crime charged against him, that you must not only find that the defendant corruptly gave said C. B. B. the \$——, as charged in the indictment, but you must also find that the said C. B. B. received said sum of \$—— from the said defendant with the corrupt purpose of influencing said B.'s official action, or to influence him, said B., in his vote, opinion, judgment, in any matter pending before him, the said B., as an official, or that might legally come before him as such official.

The defendant could not corruptly give the said B, the alleged \$——, as charged, unless said B. received it. To give implies that it must have been received by B. And of the existence of the latter fact you must be satisfied beyond a reasonable doubt.

Before you can find the defendant guilty of the crime of bribery charged, you must find beyond a reasonable doubt that the crime was committed. This is what is termed in law *corpus delicti*, or body of the crime, or in pure Anglo-Saxon, that the crime was committed.

I charge you, gentlemen, by way of caution, that in order that men may not be convicted of crimes, unless the jury are satisfied beyond a reasonable doubt that one has been com-

mitted, the law is, that before you can find the defendant guilty of the crime charged against him, you must be satisfied beyond a reasonable doubt, not only that B. was bribed, but that defendant corruptly gave him the money charged with which he was bribed, as this term has been defined and explained to you.

You are instructed, however, gentlemen, before you may find that B. received the said \$—— and that the defendant corruptly gave it to him in the manner and for the purpose hereinbefore explained, it is not necessary that this fact, if you find it to be a fact, should be proved by what is termed in law as direct and positive evidence, but, like any other fact or facts, it may be proved by presumptive and circumstantial evidence, if of such character as not to leave a reasonable doubt in your minds. Each case must depend upon its own peculiar circumstances, and the *corpus delicti* must be shown by such evidence as is capable of being adduced, and such an amount and combination of relevant facts, whether direct or circumstantial, as may establish the guilt of the defendant to the exclusion of a reasonable doubt.¹

18. *Direct and circumstantial evidence.* Direct evidence is proof of the facts by witnesses who saw the acts or heard the words spoken.

Circumstantial evidence is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged, as tend to show the guilt or innocence of the defendant; it is such proof of facts standing or existing in such relation to the ultimate fact or facts to be proved that such ultimate fact—which is the crime and the defendant's connection therewith—may be inferred or deduced from such surrounding facts and circumstances.

And if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty.

19. *Extrajudicial admission must be corroborated.* I have explained to you, gentlemen, that before you can find the de-

fendant guilty of the crime charged, that you must be satisfied beyond a reasonable doubt of the existence of the *corpus delicti*, that is, that B. was bribed. I have explained to you also that this may be shown by circumstantial as well as by direct evidence. It is my duty to give you the further instruction that an extrajudicial confession or admission, that is, one made out of court, is not alone sufficient to warrant you in arriving at a conclusion that the defendant is guilty of the crime charged, should you find any such admission to have been made. Before you could find the defendant guilty in such a case, you must find that there is other evidence, direct or circumstantial, which corroborates such extrajudicial confession or admission, and you must be satisfied beyond a reasonable doubt from all the evidence, that the defendant is guilty. An extrajudicial confession or admission made by one accused of crime is one made out of court, and is to be distinguished from a declaration made by one accused of a crime in pursuance of a common design or conspiracy, if you find any such declaration to have been made.

20. *Claims as to conspiracy.* It is charged by the prosecution in this case, but denied by the defendant, that there was a conspiracy formed between several parties, including the defendant, to procure the corrupt municipal action by the board of public service, in awarding the contract to pave East Broad street, in the city of Columbus, which resulted in the commission of the crime by the defendant as charged, as well as in the giving of other sums of money to other members of the said board of public service, by other persons alleged to be conspirators with the defendant.

It is claimed further by the state, and denied by the defendant, that this alleged conspiracy, with which defendant is alleged to have been connected, was a common scheme and design to defraud the city in obtaining the contracts in question; and the defendant enters a general denial to the charges made against him.

The court has admitted the testimony touching any and all matters pertaining to the charge in the indictment, as competent

evidence, which is now before you for your careful and thoughtful consideration.

21. *The law as to conspiracy.* Having stated the claims of the parties, it will now be the duty of the court to instruct you more particularly as to the law regarding conspiracy, as you will apply it in the consideration of the testimony offered in this case.

The question whether there was or was not a conspiracy in the transaction involved and under investigation in this case is for the jury to decide. To warrant the jury in finding that there was a conspiracy as charged in this case, it is not necessary that there should be evidence that should expressly show that fact, though it is essential that you should find that there was a common design between the parties charged with having formed the conspiracy, to warrant you in finding that there was a conspiracy in this case, still you are instructed that it is not necessary that the defendant here and the other parties alleged to have formed such conspiracy came together and actually agreed in terms to have that common design and to pursue it by common means.

If it should appear from the evidence offered in this case that the defendant and others alleged to have participated in the common design pursued, by their acts and declarations, the same object, by the same means, one performing one part, and another, another part of the same, so as to complete it with a view and purpose of the attainment or accomplishment of the same object or end, the jury may consider such evidence, if any such evidence there is, to determine whether the defendant and the others charged were or were not all engaged in the conspiracy to effect the object of such conspiracy.

For the purpose of determining whether or not there was a conspiracy as charged here, the jury in this case may consider any and all acts, declarations of the parties alleged to have formed the alleged conspiracy or to have participated therein, as well as any and all writings or documents which may have been prepared by the parties alleged to have been engaged in

said conspiracy, as well as other evidence or documents offered in evidence, which, in the opinion and judgment of the jury, may have any bearing thereon or connection therewith.

The conspiracy, as charged on the part of the state, as before stated, is an alleged conspiracy claimed to have been formed by defendant and others, to defraud the city by obtaining the corrupt or fraudulent action of the board of public service of the city of Columbus, in awarding the contracts for the paving of East Broad street in said city.

In your consideration of the evidence in this case, and in determining the question of fact whether or not there was a conspiracy as claimed, it will be your duty to ascertain and determine, not only the existence of the alleged conspiracy, but also its purpose and object, whether it was formed for an unlawful purpose, whether it was primarily for the purpose of procuring the award of the contract fraudulently, or whether it was formed, if you find that any was formed, for the purpose of defrauding the city, and obtaining the corrupt municipal action by the board of public service in the matter of the award of the contracts in question.

If you are satisfied beyond a reasonable doubt that a conspiracy was formed in the first instance to fraudulently and dishonestly obtain the award of the contract in question, then in your further investigations and considerations of the evidence, you may consider each and all of the acts of those whom you may find to have been so engaged in such common design to defraud the city, or to fraudulently obtain the award of the contract in question—whether such acts and declarations relate to such alleged conspiracy, or whether they pertain to the manner and means of obtaining or influencing the official action of the members of said board of public service.

If you should be satisfied from the evidence that there was such a conspiracy, and that the defendant was a party thereto, you must then determine whether it was for the alleged unlawful purpose of defrauding the city, by fraudulently obtaining the award of the contract in question, or whether the acts of alleged

bribery by this defendant and others engaged in the alleged conspiracy was an incident of such conspiracy, or whether the purpose of the alleged conspiracy to obtain the award of the said paving contracts was to obtain the same by fraud, as well as through corrupt means as by bribing the members of the board of public service.

If you are satisfied beyond a reasonable doubt that there was such a conspiracy for such purpose or purposes, and that the defendant was a party thereto, then you may consider such fact of conspiracy if, in your judgment, it is a fact, as well as any and all acts and declarations of all parties thereto, including those of the defendant, if you find him to be a member, together with all the other facts and circumstances as appears from the evidence in this case, in determining the guilt or innocence of the defendant of the charge made against him in the indictment. If you are not satisfied of the existence of such conspiracy, and of the defendant's connection with it, then you should not consider it in determining the guilt or innocence of the accused of the crime charged against him.²

¹ See 50 Am. St., 138-9, 78 Am. Dec. 248, 11 Am. St. 197; *State v. Rhoads*, 15 N. P. (N.S.) —.

² *State v. Rhoads*, Franklin Co. Com. Pleas, Kinkead, J.

CHAPTER LXXXII.

BROKER'S REAL ESTATE COMMISSION.

SEC.

1585. Real estate commission—Action for recovery of.
1. Statement of claims.
 2. The contract—What plaintiff must establish.
 3. When purchaser buys premises on terms other than those communicated by broker.
1586. Entitled to commission though owner declines to sell.
1587. Entitled to commission when owner enters into enforceable contract with purchaser.
1588. When broker a director of corporation purchasing property.

SEC.

1589. Broker must show that he accomplished all that was required of him by the employment, that his efforts were efficient cause of sale—If not, and owner makes sale, no recovery can be had.
1590. Entitled to compensation when purchaser produced—Though owner conducts negotiations and sells on different terms.
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Sec. 1585. Real estate commission—Action for recovery of.

1. *Statement of claims.*
2. *The contract—What plaintiff must establish.*
3. *When purchaser buys premises on terms other than those communicated by broker.*

1. *Statement of claims.* This is an action brought for the recovery of a sum of money which plaintiff claims to be due from the defendant on a specific contract alleged to have been made between the parties by which the defendant agreed to pay the plaintiff the sum of \$—— for services to be rendered by plaintiff in the sale of property belonging to the defendant.

The defendant enters a general denial.

2. *The contract—What plaintiff must establish.* The question is what the contract was between the parties. Where an owner of real estate makes a specific contract with another to act as a broker or agent to sell his property, such sale to be made upon certain terms and conditions which are prescribed and stated by the owner, to the broker or agent, the latter, the agent, to be entitled to a recovery of the amount agreed upon between himself and the owner as commission for making the sale or for producing the purchaser, it is incumbent upon him, the agent, to prove that he procured a purchaser who was ready, willing and able to purchase and take the property upon the precise terms and conditions named by the owner in the contract made by him with the agent in which the owner has authorized the agent to make the sale. The broker must, therefore, bring a purchaser to the owner of the property who is willing to take the property on the terms named by the owner in the contract made by him with the agent and the sale must have been consummated through the agency or instrumentality of the agent.¹

3. *When purchaser buys premises on terms other than those communicated by broker.* This is the general doctrine which governs and applies to this class of contracts, but it is subject, however, to another different rule that is equally as well established as a rule of law, to the effect that a broker or agent who is employed by a specific contract to procure a purchaser for, or to effect a sale of property for an owner thereof at a specified price, is entitled to his commission as agreed upon between them, if such agent produces a purchaser who is able and willing to purchase the property on terms other than those named by the owner to the agent, if and providing the purchaser is able and willing to purchase and does purchase on terms which are entirely satisfactory to the owner, though such terms are different from those prescribed by the owner in his contract with the agent. If, therefore, such owner having made a special contract with the agent, continues negotiations in connection with this sale, receiving, accepting and acting upon the services of such agent, and voluntarily agrees and consents to make, and does make the sale to the purchaser produced by such agent upon

other and different terms than those prescribed in the contract made with the agent in the first instance, such agent is entitled to the commission or compensation as originally agreed upon if the owner fails to repudiate his first agreement or fails to agree upon some other amount to be paid as compensation in making the sale upon the different terms. The jury will apply these rules in determining the question of the making of the contract which is submitted to you, the same not having been committed to writing.²

¹Johnson *v.* Wright, 124 Iowa, 61; Watters *v.* Dancey, 23 S. D. 481, 139 Am. St. 1071. But see secs. 1289, 1290 *post*.

²Cessano *v.* Walker, Franklin Co. Com. Pl., Kinkead, J.

Sec. 1586. Entitled to commission though owner declines to sell.

The jury is instructed that an agent who procures a purchaser of real estate under contract with another to do so, who is ready, willing and able to purchase the same at the terms fixed, and at a price stated, is entitled to recover his commission, even though the owner declines to sell.¹

¹Ryer *v.* Minningham, 78 N. J. L. 742; Owen *v.* Riddle, 81 N. J. L. 546, 79 Atl. 886, Ann. Cas. 1912, 45.

Sec. 1587. Entitled to commission when owner enters into enforceable contract with purchaser.

The jury is instructed that where one is employed as a broker to procure a purchaser for property, and presents to the principal or the owner of the property a proposed purchaser, it is within the right of such owner then to decide whether the person presented is acceptable. If (without fraud or other improper practice on the part of the broker) the principal or owner accepts the person presented, and enters into an enforceable contract with him, the commission is thereupon fully earned, and such agent or broker is, therefore, entitled to recover the amount thereof, even though it may subsequently turn out that the purchaser is unable to comply with his contract, and on that account the sale is not consummated by the transfer of the property.

So if the jury find that the contract between the parties was an ordinary contract, made without any conditions, the broker being employed in the usual way, and that there was no bargain entered into between the parties, except that the commission was to be paid the broker in case the sale went through, and the defendant accepted the purchaser produced by plaintiff, and entered into an enforceable contract with him for the purchase and sale of the property, then plaintiff is entitled to recover.¹

¹ *Kelley v. Baker*, 132 N. Y. 1, 28 Am. St. 542; *Francis v. Baker*, 45 Minn. 83.

Sec. 1588. When broker a director of corporation purchasing property.

The jury is instructed that where a broker who is employed by an owner of real estate to sell property is a director or member of a corporation which is the purchaser produced by such broker of the property he is employed to sell, he is not entitled to his commission unless seller or owner, being in possession of all the facts of the relation of the broker to the purchaser, consents and agrees to pay the commission under such circumstances.¹

So if the jury find—

¹ *Humphrey v. Transp. Co.*, 107 Mich. 165; *Nekarda v. Presberger*, 123 App. Div. 418.

Sec. 1589. Broker must show that he accomplished all required of him by the employment, that his efforts were efficient cause of sale—If not, and owner makes sale, no recovery can be had.

The jury is instructed that before a real estate agent or broker is entitled to recover a commission for procuring a purchaser of real estate (or making a sale), he is bound to show that he has accomplished and done all the things that he undertook to do under the contract of employment, it is incumbent on him to show that he found and produced a person who was ready, willing and financially able to purchase the property which he

was engaged to sell, at the price and upon the terms and conditions fixed by the owner of the property and the one who employed him. He must show also that he was the efficient agent or procuring cause of the sale, and that the means employed by him and his efforts resulted in a sale.

So where a broker under employment by the owner, opens up negotiations with a proposed purchaser, but abandons them without fault of the owner, and the owner himself subsequently sells the same property, without further effort on the part of the broker, in such case the owner is not liable to the broker for commissions.¹

So if the jury finds.

¹ *Chaffee v. Widman*, 48 Colo. 34, 108 Pac. 995, 139 Am. St. 220. See note in latter report on pp. 225-259, Necessity of Broker Being Procuring Cause of Sale, numerous cases cited on p. 245.

Sec. 1590. Entitled to compensation when purchaser produced though owner conducts negotiations and sells on different terms.

The jury is instructed that a broker employed to sell land is entitled to his compensation if he brings to the seller a purchaser able, ready and willing to purchase on the terms named, or if he brings them together and the sale is afterward consummated by the seller himself.

So, if the broker introduces a prospective purchaser, and the owner undertakes to conduct the negotiations, and finally sells the property for less than the terms named in the contract with the broker, he thereby waives his right to insist on the terms of the contract in that respect, and is liable at least for a reasonable commission, and the contract may be considered as a guide by the jury in arriving at what is reasonable compensation.¹

¹ *Smith v. Sharpe*, 162 Ala. 433, 50 South. 381, 136 Am. St. 52; *Jones v. Henry*, 15 Misc. 151; *Plant v. Thompson*, 42 Kan. 664, 16 Am. St. 512; *Sylvester v. Jackson*, 110 Tenn. 392. The rule of this instruction is not uniform, many authorities holding that a broker must make the sale according to the terms fixed in the contract made by him with the owner, and that he must be the efficient cause of the sale. See note and cases 139 Am. St. 220-259. See *ante*, secs. 1285 and 1289.

Sec. 1591. Right of agent to commission when several employed—Purchaser produced must be client of agent first conducting negotiations.

The duty of a vendor who employs more than one broker to sell his property is to allow them to act independently and to remain neutral as between them, as well as between them and a purchaser. The owner can not step in and complete the sale and escape liability for commission. Such owner is required to exercise the utmost good faith with the brokers.

Where property is listed by an owner with several agents, who are under such employment at the same time, the one who first sells the property is entitled to the commission. But before such agent or broker can be considered as the producer of a purchaser, the party whom he presents to the vendor and owner must be a client or customer of his own, and not one then sustaining existing relations to another broker under like employment and who is at the time conducting negotiations concerning the sale. The broker or agent who was first in negotiation with the proposed purchaser and vendor continues to sustain that relation until it is expressly broken off, or the matter of the purchase has ceased to be held by him under consideration. The employer, with notice of the pendency of such negotiations, can not escape liability to the broker for his commission by selling to his customer through another, even though he first discharges the former, if he does so without giving him a reasonable time to effect the sale.¹

¹ *Jennings v. Trummer*, 52 Ore. 149, 96 Pac. 874, 132 Am. St. 680; *Tinsley v. Scott*, 69 Ill. App. 352; *Day v. Porter*, 60 Ill. App. 386.

CHAPTER LXXXIII.

BUILDING CONTRACTS.

SEC.		SEC.	
1592.	Substantial departure therefrom without consent— Recovery for extras.	1597.	Same—Acts showing knowledge of departure from contract.
1593.	Failure to do work in workmanlike manner.	1598.	Same—Settlement without fraud or mistake.
1594.	Substantial performance, except slight variations.	1599.	Contract as to extras.
1595.	Deduction for unfinished parts.	1600.	Substantial performance of contract.
1596.	Owner estopped by conduct in acquiescence in work not done according to contract.	1601.	Extras—Whether contract express or implied, or work voluntarily done.

Sec. 1592. Substantial departure therefrom without consent— Recovery for extras.

It being admitted by both parties that written contracts were entered into between them, these should control so far as applicable to the matters in contention, except as you find that they have been modified by the mutual consent of the parties.

Any substantial variation or departure in construction, or material from that provided for by the terms of the written contract, unless made with the consent and approval of the defendant, though it made the completion of the job more expensive than provided for in the contract, would not constitute such extras as would entitle the plaintiff to recover therefor.

To enable the plaintiffs to recover for extra expenses by reason of deviations from the plans stipulated for in the contract, it must appear that the same were made, and with the authority of the defendant, either express or implied, and under such circumstances that implied that he should pay therefor. * * *
If you find from a preponderance of the evidence, and guided and limited by these instructions to you, that such extra work

and material were furnished, and if you also further find that the defendant became obligated to pay therefor, as herein defined and limited, then whatever extras the plaintiffs did so actually provide would constitute a valid claim, to the extent of their reasonable value, at the time and place they were applied, unless the price for such modifications were expressly agreed upon, in which case the express agreement should prevail.

If anything was omitted or changes were made to an inferior and less expensive mode of construction than stipulated for in the contract, the defendant would be entitled to have the value of the omitted material and the difference in the value of the less valuable material from that contracted for deducted from any balance due the plaintiffs on the contract, unless substitutions were made of other materials or work in lieu thereof by the authority of the defendant, and which were considered by the parties as an equivalent therefor. To the extent the parties agreed upon such omissions or substitutions you may consider the contract modified, and in adjusting balances, allow or deduct what the evidence shows would be reasonable, having reference to the stipulations of the contract in that respect, unless you find these matters to have been agreed upon by the parties as to price, in which case the agreement should prevail.¹

¹ Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

Sec. 1593. Failure to do work in workmanlike manner according to contract.

If, in respect to any of the matters alleged in the defendant's answer, the plaintiffs did not do their work in a workmanlike manner, and according to the stipulations of the contract, then the defendant would be entitled to have such difference in value deducted from the contract price, unless you find that the defendant accepted the same as a compliance with the contracts, or settled therefor as herein qualified. We include in this instruction those matters agreed upon though not included in the written contracts.¹

¹ Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

Sec. 1594. Substantial performance, except slight deviations.

If the plaintiffs fully performed their part of the contract, then they would be entitled to recover the full price contracted for, less payments actually made.

But if the plaintiffs substantially complied with the contract except in some slight deviations, they would be entitled to recover the contract price, less the diminution in value to the owner on account of the deviations; or what the house was actually worth less on account of these departures.¹

¹ Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

Sec. 1595. Deduction for unfinished parts.

The jury is instructed that plaintiff is entitled to recover the balance due at the contract price, less such sum as it may require to construct or complete the unfinished parts according to the terms and conditions of the contract, as well as any reasonable expense made necessary by being compelled to procure such completion.¹

¹ Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas, 26 O. S. 101.

Sec. 1596. Owner estopped by conduct in acquiescence in work not done according to contract.

If the work was not according to the contract and you find that the defendant stood by and saw them prosecute the work without objection, and was benefited by the labor and materials, the plaintiffs would be entitled to compensation to the extent of such benefit; that is, what the same were reasonably worth, but not to exceed the contract price. Or, when the same was completed, but lacking in quality, the contract price is to be reduced by the difference in the value of the work as it would have been by the contract and as it actually was.

Defendant is entitled to have his contract, in its true spirit and intent, substantially executed, except as its terms have been waived by C., or his duly authorized agent in the premises, and any failure on the part of plaintiff to so perform entitles de-

fendant to reduction of the contract price to the extent the same was rendered thereby less valuable than contracted for, unless defendant being advised in the premises, knowing the material facts, accepted the buildings as a performance of the contracts, or settled therefor as herein defined and qualified.¹

¹ Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

Sec. 1597. Same—Acts showing knowledge of departure from contract.

The fact that the defendant had bills rendered from time to time to him, and was present as the work progressed, paid money from time to time, went into possession of said house and barn, the knowledge he had of and concerning the same, what he said and did concerning the character of the work and material, are circumstances from which the jury may infer whether he had or had not information as to the modifications from the contract, character of the work, extras, material, quality and price thereof, and whether he did or did not assent to, or accept the same, or settle therefor.¹

¹ Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

Sec. 1598. Same—Settlement without fraud or mistake.

The jury is instructed that if the parties got together and fully settled the matters growing out of the building transactions, the same would conclusively bind the parties, in the absence of fraud or mistake. But if you find that the defendant acted with reasonable prudence, and in good faith, and relied upon the representations of the plaintiffs and was deceived thereby, and by reason thereof agreed upon a settlement he would otherwise not have made, he would not be bound thereby. If the defendant acted in good faith and not knowing and having no knowledge of any deception, he would be entitled to rely upon the representations of plaintiffs made to him in making settlement.

If you find that a settlement was actually entered into by said parties and as part thereof plaintiffs promised the defend-

ant that if said work had not been in fact done and performed in accordance with the representations and said contracts, that plaintiffs would on request of defendant return to said buildings and do all things required, in order to make the work as represented by plaintiffs, and as required by said contracts, then it would be obligatory upon defendant to make such request within a reasonable time, and what would be a reasonable time we leave for you to say from the evidence submitted to you, before defendant would be entitled to a reduction for failure to return to said buildings and do all things required in order to make the work as represented by plaintiffs, etc.

But if you find that the representations by plaintiffs were false and untrue as to the state of said work and material, that in substantial particulars the work had not been performed in accordance with the terms of said contracts, that the said extras so as aforesaid charged for were estimated both in quantity and value greatly in excess of the amount actually done, or of the value of that which was done, and that the defendant relied upon such representations and promises, and not knowing to the contrary, and defendant thereafter requested the plaintiffs to return to said work and complete the performance thereof, as required by said contracts, and the plaintiffs neglected, and ever since have neglected so to do, or you find that the parties did not settle as herein defined, the promise of the defendant to pay said balance would not be binding on him.¹

¹ Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

Sec. 1599. Contract as to extras.

That you may determine the matters at issue between the parties, you will look into the evidence and find what work and material the written contract entered into for the construction of the building required to be done. After you have ascertained that, then you will inquire whether or not the plaintiff did anything at the request of the defendant towards the construction and completion of the building, other than that agreed to be done in the written contract. If you find that work was done

other than that or outside of that provided for in the written contract, then you must ascertain what it was reasonably worth. Any substantial violation or departure in the construction of the building from that provided for in the terms of the written contract, if made at the request of the plaintiff and which made the completion of the work more expensive than that provided for in the written contract, then that would constitute such extras as would entitle the plaintiff to recover therefor to the extent of the reasonable value of the extra work and material so supplied at the request of the defendant. If you find that this extra work was done by the plaintiff at the request of the defendant and that there was no special or other contract, it should be paid therefor, you are instructed that the law implies a contract on the part of the plaintiff that he will pay the defendant such an amount as the work is reasonably worth.¹

¹ Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

Sec. 1600. Substantial performance of contract.

Before the defendant can recover upon this cause of action the full amount of its claim, it must establish by a preponderance of the evidence that the defendant has substantially performed said contract according to its terms, and that, notwithstanding such performance, the architect has fraudulently, or unreasonably refused to issue the final certificate therefor. However, if the defendant has substantially performed on its part the terms of said contract, and only slight omissions or inadvertences have occurred, or exist, where the defendant has made an honest effort to perform, and has not willfully omitted the performance of the terms of said contract, and, further, if the architect fraudulently or unreasonably refused to issue the certificate as required by the contract, the defendant is entitled to recover the amount or balance due on the contract, less such an amount as will compensate the plaintiff for the loss suffered by reason of such slight omissions and inadvertences, if any. But if the omissions or inadvertences, if any, are not slight, but are of a substantial character, then you are justified in finding that the contract was

not substantially performed by the defendant, and that it is not entitled to recover the balance of the contract price, for defendant in order to recover on its contract must show substantial performance on its part, and this rule applies to the contract in question, as well as any other contract.¹

¹ The F. & R. Lazarus & Co. v. The Bryant Bros. Art Glass Co., Franklin County Court of Com. Pleas, Rogers, J.

Sec. 1601. Extras—Whether contract express or implied or work voluntarily done.

The plaintiff claims, in addition to the balance due on the contract, that he is entitled to \$—— for extras finished after the original contract was entered into, an itemization of which extras claimed is attached to the petition. The court instructs you that these items of extras, and each one of them, are based upon an alleged agreement therefor. However, it is not necessary that the plaintiff and defendants should expressly agree that the items of work as claimed by the plaintiff should be performed or that they would pay any specific amount therefor. But, the agreement may be implied from all the facts and circumstances surrounding the relations of the parties, both as to the performance of the work and the price to be paid therefor. Whether or not there were agreements, either express or implied, with regard to the alleged extras or changes, or any of them, is a matter for your determination from the evidence under the charge of the court. An express agreement arises from the express language used showing an agreement. An implied agreement arises from the facts and circumstances showing that by tacit understanding between the parties an agreement was intended. As to such items for extras, if any, as show an agreement between the parties therefor, you will allow to the plaintiff the reasonable value, as shown by the evidence, for such extras, if any. But if as to any or all the said items for extras, the facts and circumstances show no agreement, either express or implied, therefor, it will be your duty to disallow any or all such items, as the case may be.

The defendants admit that they are indebted to the plaintiff for the sum of \$—— for enlarging flues and placing furnace stacks in the house. The plaintiff's claim is that the \$—— was not for enlarging flues and placing furnace stacks, but was for furnace pipes in the house.

Therefore, you will determine from the whole evidence whether or not the plaintiff is entitled to be paid for any of the items of extras set up in his second cause of action. If you find by a preponderance of the evidence that the plaintiff is entitled to any of them, you will determine the amount to which he is entitled and include such amount in your verdict. If you find he is not entitled to anything except the \$—— for enlarging flues and placing furnace stacks, you will merely allow that amount as a part of your verdict.

If you determine that the plaintiff had no contract with the defendants, either express or implied, from all the facts and circumstances in the case, with regard to the alleged items for extras, or any of such items, but that the plaintiff voluntarily did the extra work or any part of it without any orders from the defendants, or either of them, or, if you find that changes were made in the house, which, by mutual arrangement between the parties, either express or implied, were not to be charged against the defendants as extras, you will not allow any extras for such items to the plaintiff, even though he may have made the house better by reason of extra material furnished or labor performed in the construction of the house. For the matter of extras, as heretofore stated, was a matter of agreement between the parties either by reason of an express understanding between them or arising from such facts and circumstances as will imply an agreement between them, to perform the extra work and to receive payment therefor, and the plaintiff would have no right to volunteer to furnish additional material or better material or to do extra labor upon the house without some agreement, either express or implied, to be paid therefor, and then charge the defendants for such material or labor or both, as the case may be. In other words, if he made the house better than the

original contract provided for without any agreement, either express or implied, between the parties, he has no right to recover for such extra work. However, if as to some of the items he had an understanding or agreement, either express or implied, with the defendants, and as to other items he did not have an understanding, either express or implied, that he should do the extra work and be paid therefor, as to those items wherein he had an understanding or agreement, you will make allowances to the plaintiff for the amount to which he is entitled, and as to those wherein there was no understanding or agreement, you will not make any allowance.¹

¹ *Stolz v. Grasser, et al.*, Court of Com. Pl., Franklin Co., Rogers, J.

CHAPTER LXXXIV.

BURGLARY.

SEC.	SEC.
SEC.	1614. Complete instructions to jury in charge of burglary of storehouse—Embracing:
1602. Burglary and larceny.	1. Burden.
1603. Burglary—Degree of force.	2. Presumption of innocence.
1604. Burglary of chicken or hen-house.	3. Reasonable doubt.
1605. Burglary of dwelling house.	4. Credibility of witnesses.
1606. Maliciously breaking and entering.	5. Accomplice — Testimony of.
1607. Breaking and entering.	6. Alibi.
1608. Burglary of inhabited dwelling.	7. Circumstantial evidence.
1609. Must be in night time.	8. Possession of stolen property.
1610. Intent to steal.	9. The statute.
1611. Intent to steal from railroad car.	10. Night season.
1612. Burglary of railroad car—Proof of incorporation not necessary.	11. Maliciously breaking.
1613. Entry into car.	

Sec. 1602. Burglary and larceny—Force necessary in.

As to the force necessary to constitute a breaking, it may be the lifting of a latch, making a hole in a wall, descending the chimney, picking, turning, or opening a lock with a false key or other instrument; lifting a latch or other fastening,¹ removing a pane of glass; pulling up or down an unfastened sash; removing the fastening of a window by inserting the hand through a broken pane; pushing up a window which moves on hinges and so fastened by a wedge, and other like acts. It has also been held by the highest court of this state that: "The force necessary to push open a closed but unfastened transom that swings horizontally on hinges over an outer door of a dwelling is sufficient to constitute a breaking under our statutes, which requires a forcible breaking."²

Then as a matter of law to constitute a burglary there must be a forcible³ breaking which must precede the entry,⁴ but it is not necessary that there should be any destruction of a building, or any destruction of the parts of the building. If you find from the evidence that the doors of the car were closed, and that the fastenings of the door of the car were removed, and the door pushed or forced open, that would be sufficient to constitute a breaking under our statute.⁵

¹ 81 Iowa, 93.

² *Timmons v. State*, 34 O. S. 426.

³ The constructive breaking of the common law is sufficient. *Ducher v. State*, 18 O. 308.

⁴ *Wine v. State*, 25 O. S. 69.

⁵ *Nye, J., in State v. Kemp, et al., Lorain Co. Com. Pleas.* Entering dwelling by a trick has been held burglary. *State v. Henry*, 9 Iredell, 463.

Sec. 1603. Burglary—Degree of force.

“If the jury are satisfied beyond a reasonable doubt as to all the other elements necessary to constitute a burglary except a breaking, and find that the transom was closed on the night in question, though not fastened, and that the defendant used sufficient force to push it from its place, so that it would swing open, that would be a sufficient breaking in law, and, under the circumstances, if satisfied beyond a reasonable doubt, their verdict should be guilty.”¹

¹ *Timmons v. State*, 34 O. S. 426.

Sec. 1604. Burglary of a chicken or henhouse.

The jury is instructed that a hen house in law is considered to be within the statute making it burglary to maliciously and forcibly break and enter any “other building” than those specifically named in the statute, provided the henhouse is a structure of some permanence. It need not be absolutely permanent, nor of such character of structure as that its removal would damage the real estate. A mere temporary movable chicken coop is not such a structure as comes within the statute

prescribing the crime of burglary.¹ Before you can find the defendant guilty you must find that defendants maliciously and forcibly broke and entered a chicken or hen house of some permanency, with intent to steal property of any value.

¹ General Code, sec. 12438. *Bailey v. State*, 7 C. C. (N.S.) 28, 16 O. C. D. 375; *affd.* 69 O. S. 551. A poultry house. *State v. Buechler*, 57 O. S. 95.

Sec. 1605. Burglary of dwelling house.

The statute provides that whoever in the night season, maliciously and forcibly breaks and enters an [uninhabited] [inhabited] dwelling house with intent to steal property of any value, or with intent to commit a felony, is guilty of burglary.¹

The elements of this crime, and the several facts, the existence of which the jury must find before the defendant can be convicted by your verdict are that the defendant did in the night season, on or about —, 19—, within the county of — and state of Ohio, maliciously and forcibly break and enter an uninhabited dwelling. The jury must also be satisfied that the defendant did maliciously and forcibly break and enter the dwelling house with the intent to steal the property then and there located or being in the dwelling house which is of some value.

¹ Code, sec. 12438. See full charge in Burglary. *State v. Walshenberg*, 7 N. P. (N.S.) 219.

Sec. 1606. Maliciously breaking and entering.

To maliciously break and enter a dwelling house is to do so with a wicked or mischievous intention of mind; to be possessed and controlled by a depraved inclination towards mischief; with an intention to do an act which is wrong, without just cause or excuse, being and constituting a wrongful disregard for the rights and safety of others.

If you find that the defendant did break and enter the dwelling house of — as charged in the indictment, the jury may be justified in the presumption that it was done maliciously.

Sec. 1607. Breaking and entering.

The court will instruct the jury concerning the legal meaning of the terms to break and enter the dwelling house. No particular degree or amount of force is required to constitute a breaking within the meaning of the statute. The law is satisfied with any force, however slight, that may be used in entering the dwelling house, the opening of a door, whether locked or unlocked, the mere lifting of a latch, or breaking a lock, or using a key in the lock, or any kind of breaking necessary to gain entrance may be considered a sufficient breaking within the law. The breaking must not only be forcibly, but it must precede the entry.

[In order to find that there was a breaking, you must find that a door was opened or a window was raised through which defendant entered. If the door was opened, and defendant merely passed through an open door, it does not constitute a breaking within the law.] ¹

1. *The entry.* There must be an entering of the person or some part of the body of the person charged with the crime, in order that he may be guilty of burglary.

Before the defendant may be found guilty of burglary of an [uninhabited or inhabited] dwelling house in the night season as charged, the jury must find that he did maliciously and forcibly break and enter, in the manner as explained to you, the dwelling house of — on or about —.

¹ *Timmons v. State*, 34 O. S. 426; *Ducher v. State*, 18 O. 308. Pushing open a closed, unfastened transom. *Timmons v. State*, *supra*. Code, sec. 12438. Box car partially open. *State v. Long*, 5 O. D. (N.P.) 617. If car is fastened by a cleat or hasp, and sealed, there is a breaking. *State v. Long*, 5 O. D. (N.P.) 617.

Sec. 1608. Burglary of inhabited dwelling house.

In order to find the defendant guilty, the jury must be satisfied from the evidence that the defendant did maliciously break and enter an inhabited dwelling house, that is, you must find that the house as alleged in the indictment was a dwelling house, that is, a house used for the purpose of a home, or a place

to live, and that it was at the time of the breaking and entering, inhabited, that it was occupied by persons living in it, who were occupying it as a home.

Sec. 1609. Must be in night time.

It is necessary that both the breaking and the entering should be done in the night time. It is night in the sense of the law when there is not daylight enough left or begun to discern a man's face. Again night is defined as being: "That space of time during which the sun is below the horizon of the earth, during which by its light the countenance of a man can not be discerned." Night season consists of the period of time from the termination of daylight in the evening to the earliest dawn in the morning.

Then you are instructed that the night season is that period of time after the sun goes down at evening and before it rises in the morning, when it is so dark that a person's face can not be discerned by the daylight. It was necessary, therefore, that the offense must have been committed in the night season to commit a burglary.¹

¹ Nye, J., in *State v. Kemp*, Lorain Co. Com. Pl. *State v. Walshenberg*, 7 N. P. 219; *State v. Gundersons* (Wash.), 21 Am. Ann. Cas. 350. Nighttime by common law begins when daylight ends, or when the countenance ceases to be reasonably discernible, and ends at earliest dawn, or as soon as the countenance becomes discernible. *Clark's Cr. Law*, 237; *People v. Griffin*, 19 Cal. 578; *State v. Bancroft*, 10 N. H. 105. "The jury must determine this question independently of a capricious test." *Whart. Cr. Pl. and Pr.*, sec. 1612; *Lewis v. State*, 16 Conn. 32. The nighttime may be shown by circumstantial evidence. *State v. Bancroft*, 10 N. H. 105.

Sec. 1610. Intent to steal.

It is not necessary to constitute burglary, that the accused should actually have stolen any property; it is sufficient if the breaking and entering was made with the specific intent to steal.

The term steal, means in legal contemplation, the wrongful and fraudulent taking of property of another, of some intrinsic or substantial value, without his assent, and with the intent to

deprive the owner thereof permanently.¹ Direct evidence is not necessary to prove intent; it may be proved by facts and circumstances. The intent may be inferred or presumed from the unlawful act of breaking and entering.

¹ State v. Walshenberg, 7 N. P. 219.

Sec. 1611. Intent to steal from railroad car.

The fourth thing that is necessary to constitute the offense of burglary is that the breaking and entering must have been done with an intent to steal the personal property of some value of the C. C. C. & St. L. R. R. Co., situated in said car. It is not necessary that anything be actually stolen. The offense is complete under the statute if the defendant broke and entered the car named in the indictment, in the night, forcibly and maliciously with the intent to steal property of some value situated in the car of the said railroad company. But direct and positive testimony is not necessary to prove the intent. It may be proved by facts and circumstances. If you find from the evidence that the property was stolen from the car by the defendants, you may consider that fact in determining with what intent the defendants entered the car, if you find they entered it.¹

¹ Nye, J., in State v. Kemp. The property intended to be stolen must be property subject of larceny. State v. Lymus, 26 O. S. 400.

Sec. 1612. Burglary of railroad car—Proof of incorporation not necessary.

“It is not necessary for the state to prove the articles of association or charter of the railway corporation, but it is sufficient to prove by reputation that there was, at the time when the crime is alleged to have been committed, a corporation known by that name, operating such road, and carrying goods, stock, and passengers for hire in its cars running along said company’s road. A *de facto* existence of the corporation is only necessary to be shown.”¹

¹ Burke v. The State, 34 O. S. 79. It would have been necessary before the code. *Id.*

Sec. 1613. Entry into car.

The jury is instructed that it would not be necessary that the whole person of the burglar * * * go within the car. It would be sufficient entering the car if he reached a hand into the car, and it would be a sufficient entry in the car if he thrust a stick, a fork, or a hook into the car with intent to steal property contained therein. That would be a sufficient entry, providing you find the other things necessary to constitute the crime of burglary.¹

¹ Nye, J., in *State v. Kemp*, Lorain Co. Com. Pl. R. S., sec. 6835. Both the entry and breaking are essential, though they need not be simultaneous. *Malone's Cr. Briefs*, 186, 1 Hale, 551.

Sec. 1614. Complete instructions to jury in charge of burglary of storehouse embracing:

1. *Burden.*
2. *Presumption of innocence.*
3. *Reasonable doubt.*
4. *Credibility of witnesses.*
5. *Accomplice, testimony of.*
6. *Alibi.*
7. *Circumstantial evidence.*
8. *Possession of stolen property.*
9. *The statute.*
10. *Night season.*
11. *Maliciously breaking.*

You have heard the evidence and the argument of counsel and it now becomes the duty of the court to give you such instructions concerning the law of this case, as will guide you in your duties in determining the questions of fact which you will draw from the evidence which has been introduced before you.

In plain terms the defendant is charged with committing the crime of burglary of a storehouse. The indictment has been read to you once or twice and I may simply now state that it charges that F. W. on the —, 19—, in Franklin county, and in the night season, entered a storehouse of The E. C. Company,

situate in Franklin county, and that he unlawfully, maliciously and forcibly broke and entered that storehouse with the intent to steal the personal property of The E. C. Company then located in that storehouse; and that he did unlawfully steal a certain lady's blue coat described more particularly in the indictment, of the value of eleven dollars; and that he did steal, take and carry same away.

The defendant has entered a plea of not guilty. That is he denies each and all of the essential elements charged in the indictment which constitute the crime of burglary.

1. *Burden.* That imposes upon the state the burden of proving all of those essential elements to your satisfaction and beyond a reasonable doubt, which is the degree and measure of proof necessary to be applied by you in your consideration and in your verdict.

2. *Presumption.* The law presumes, however, in all criminal cases that in entering upon the consideration of the evidence in this case that the defendant stands innocent of any crime, or of the crime charged against him; that is in entering upon the consideration of the evidence you are to start out upon the theory and the presumption of law that he is innocent and to carry that in your minds until such time in the consideration of the evidence, as you shall be convinced therefrom beyond a reasonable doubt that the defendant is guilty. That is all there is in that matter of presumption of innocence. It is not an idle matter but it is a rule binding upon you in the consideration of the case.

3. *Reasonable doubt.* Proof beyond a reasonable doubt may be defined variously and at great length, but in simple terms it means nothing more than a reasonable uncertainty existing in the minds of jurors as to the guilt of the accused, after having considered all of the evidence offered in the case. It is not a mere speculative, captious doubt which might or might not be excited in the mind of a juror or jurors for the mere purpose of shirking the performance of a disagreeable duty; but on the contrary it is a substantial doubt; you must be convinced from

all of the facts and circumstances introduced in evidence beyond a reasonable doubt that the defendant is not guilty before you can acquit him.

4. *Credibility of witnesses.* The credibility of the witnesses is within your sole province to determine and all that you need do in that regard is to use your common sense in applying such tests as each and all of you may wish to do or may believe that you ought to apply in the consideration of the evidence in this case, as jurors you are nothing more than men as on the outside, and you will apply the same tests as jurors as you would apply to facts elsewhere. You may consider the interest that any one might have in testifying one way or the other, if any such interest appears.

The constitution of the state now provides that the failure of a defendant to testify may be considered by the court and jury.

5. *Accomplice—Testimony of.* It has long been an established rule of practice in criminal procedure that the court must give some kind of precautionary instructions to the jury in regard to the testimony of an accomplice, one charged with the same crime or with having taken some part in the crime charged, and we have heard the testimony of M. P., who is jointly indicted in this crime with the defendant. Now, the mere fact that she is jointly indicted with this defendant does not disqualify her as a witness; she is just as competent to testify as a witness as any other person, even though she is indicted. The turpitude of her conduct, if there is to be attributed any such to her conduct, does not disqualify her, but the credit to be given her testimony, considering her joint indictment and all the facts and circumstances appearing in the evidence, is a matter entirely within your judgment and discretion.

Finally in respect to the testimony of M. P. the court charges the jury that you should be cautious and prudent in the exercise of your judgment and discretion in considering the weight and credit to be given the testimony of M. P., that matter being entirely within your discretion it being your duty to consider

her testimony in the light of all of the other testimony and facts adduced in the evidence in the case.

6. *Alibi.* There is evidence here offered by the defendant on the claim of defense of what is termed in law as an alibi; that is, the claim is that the defendant was not at the storehouse of the E.-C. Company on the night of the sixth day of November, 1912, but that he was elsewhere as is claimed in the evidence. The court instructs you that such a defense is a proper one and just as legitimate as any other kind of a defense, and that it is your duty to consider all the testimony offered which relates to such defense, but in considering the same the court instructs you that you are to keep in mind and apply the degree and measure of proof required in criminal cases. That is you will consider the claim of alibi, together with any and all other evidence, and if upon the whole evidence—that relating to the alibi as well as that relating to the body of the crime—you should not have an abiding conviction of the guilt of the defendant then it would be your duty to acquit the defendant. But on the other hand if you should feel satisfied beyond a reasonable doubt of the guilt of the defendant, considering the claim of alibi, together with all of the other evidence offered in the case, then it would be your duty under such circumstances to find the defendant guilty. In other words, plainly and simply, there is no different degree or measure of proof applying to this defense of alibi but the one measure of proof applies—that is the reasonable doubt rule.

7. *Circumstantial evidence.* It is also necessary for the court to give you some precautionary instructions concerning what is known and designated in law as circumstantial evidence. Now that means nothing more nor less, gentlemen, than proof of facts from which inferences may be drawn, having a legitimate bearing upon the main facts involved in this case; or circumstantial evidence is the proof of facts and circumstances which does not directly prove the essential elements of a crime but is on the contrary the proof of other facts and circumstances from which inferences may be drawn tending to prove the elements of the crime. Circumstantial evidence, which is evidence by way of

deduction or inference, is as competent as any other, but it must be of such character as to exclude from your minds all reasonable doubt of the guilt of the accused; that is if in considering the circumstantial evidence you should be able to draw such inferences therefrom as would convince you beyond all reasonable doubt that the defendant was guilty of the crime charged then it would be your duty to so find him guilty. But if in considering the circumstantial evidence, together with all the other evidence you should not have in your minds an abiding conviction of the guilt of the accused, then it would be your duty to acquit him.

8. *Possession of stolen property.* There is another matter of evidence concerning which the court must give you some precautionary instructions, as to your duty in considering the same. It is in regard to the alleged possession of the stolen property. That is in this case there is some evidence to the effect that the defendant had possession of the property stolen. Of course it is for you to determine whether he did have any such possession. Now the law is that evidence of the alleged possession of stolen goods by an accused and the giving of a false account of such possession is competent to be considered by the jury in connection with all the other facts and circumstances bearing on the guilt or innocence of the defendant and the jury may draw such inferences therefrom as it may deem warranted under all the conditions, considering all of the evidence, that which relates to the body of the crime, as well as that relating to the claim of alibi. By body of the crime I mean the actual breaking and entering into the storehouse and stealing the property.

In considering such testimony concerning the alleged burglary of the storehouse and the stealing of the property you should consider further whether the alleged circumstances have been corroborated by other criminative circumstances or whether it stands alone without corroborating facts. Whatever be the nature of such evidence, the jury on the whole must be convinced of the guilt of the accused beyond a reasonable doubt upon consideration of all the evidence before you can find the defendant guilty.¹

9. *The statute.* Code § 12438. Those are all instructions so far, gentlemen, concerning your duty in the consideration of the evidence in this case, and I now come to the body of the crime, so called, *and the law of this state as embodied in the statute*, which provides that whoever in the night season maliciously and forcibly breaks and enters a storehouse with intent to steal property of any value is guilty of burglary. Code § 12438. You will notice from a reading of that statute that there are four or five elements in the crime of burglary; that is it must be done in the night season, the breaking must be an actual breaking, and there must be an actual entering of some of the body, or of some part of the body, and there must be an intent to steal the property.

10. *Night season.* We all know what the night season means. It means in court just what it means anywhere else. It means in law what is ordinarily understood by persons generally; that is it is that period of time after the sun goes down in the evening and before it rises in the morning when it is so dark that a person's face can not be discovered by the daylight.

11. *Maliciously breaking.* Malice in law does not mean what we might ordinarily comprehend by that term in every day parlance. It does not mean necessarily ill will or personal spite but it is a term used in law rather as indicative of a mind which is fatally bent on mischief, or which is so depraved as to be devoid of all social or legal obligations, one that is so perverted as to have no regard or respect for the rights of others. To commit such acts maliciously is to do them with wicked, mischievous intention of mind; that is an intention to do an act or wrong without regard to the rights of others; it is indicative of a wicked and depraved mind and devoid of all social and moral duties.

To forcibly break and enter means that some force must be used to break and enter and the law is satisfied with any force, however slight that may be used in opening a door or window or other opening of a building.²

¹ Methard v. State, 19 O. S. 363, 3 C. C. 551, 17 C. C. 486.

² State v. Wilson, Franklin County, Kinkad, J.,

CHAPTER LXXXV.

COMMON CARRIERS OF FREIGHT.

SEC.

- 1615. Common carrier defined.
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1636. Same continued—Reasonableness of rules—How determined.

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1638. Carrier bound to use ordinary care in shipment of livestock when there is delay.

1639. Cold weather—Not act of God.

1640. Baggage—What constitutes.

1641. Baggage—Liability of carrier, that of an insurer.

Sec. 1615. Common carrier defined.

A common carrier is one that undertakes, for hire or reward, to carry, or cause to be carried, goods for all persons, indifferently, who may choose to employ him, from one place to another.

Sec. 1616. Common law rule of liability of common carrier.

A common carrier is responsible for the safe transportation and delivery of goods received by him for carriage, and can only justify or excuse a default when occasioned by the act of God, or the public enemy; he is not only responsible for his own acts of malfeasance, misfeasance and negligence in the course of his employment, but he is also regarded as an insurer against all loss or damages which may happen to goods whilst in his charge, for the purpose of his employment, though occasioned by unavoidable accident, or by any casualty whatever, except only as just mentioned, and the burden of proof is thrown upon the carrier in bringing any particular case within the exception.

For, in the absence of proof, the loss itself raises the presumption of negligence on the part of the carrier. The act of the public enemy is not claimed as an excuse for the non-performance of duty; the available excuse for the nondelivery of the goods to the consignee there must be the act of God.¹

¹ From B. & O. R. R. Co. v. Crawford. Affirmed by Circuit Court. Settled in Supreme Court, No. 2236. May, J.

Sec. 1617. Act of God defined—Inevitable accident.

By the term "act of God" is meant something superhuman—something beyond the power of man to foresee or guard

against. It means inevitable accidents, something that happens without the intervention of man. Where one is pursuing a lawful vocation in a lawful manner, and something occurs which no ordinary skill or precaution could foresee or prevent, and as a consequence the accident takes place, this is called inevitable accident.

A loss by fire is not a loss by act of God. It means those events and accidents which proceed from natural causes, and can not be anticipated and guarded against or resisted; such as unexampled freshets, violent storms, lightning and frosts. For losses occurring by any of these means, a common carrier is not liable, provided he has not been guilty of any want of ordinary and reasonable care to guard against such loss.

Whether in this case such care and diligence were or were not used by the defendant, and whether the loss resulted therefrom, are questions for you to determine in view of all facts and circumstances proved on the trial. The burden of showing the use of ordinary care to prevent the loss is upon the defendant; this showing must be a preponderance of the evidence; that is, the evidence in its favor must outweigh in your minds through weight and importance all other evidence to the contrary. Otherwise you should find for plaintiff. Speaking in other words as to ordinary care, if you find by a preponderance of the evidence that the defendant used such care and diligence to prevent the loss of the goods entrusted to it as ordinarily prudent men usually exercise toward their own property under like circumstances, your verdict should be for the defendant; but if the evidence in this direction just balances by your consideration with the evidence to the contrary, or if you find from such preponderance of evidence that the defendant did not use such care and diligence, and the loss resulted therefrom, your verdict should be for plaintiff.¹

¹ From *B. & O. R. R. Co. v. Crawford*. Affirmed by Circuit Court. Settled in Supreme Court, No. 2236. May, J.

Sec. 1618. Liability of express company for loss of horse in shipping.

1. *Liability of common carrier in absence of special contract.*
2. *Prima facie case made by delivery of horse.*
3. *Death of horse from natural causes during transportation is act of God.*
4. *Duty of company when horse falls in stall.*
5. *Liability if company improperly treats horse.*
6. *Livestock contracts—Existence of written contract fixing rights and liabilities.*
7. *Same—Contract, if made, when to be construed according to laws of another state.*

1. *Liability of common carrier when no special contract.* The ultimate question of fact which you have to determine is this: Is the defendant liable to the plaintiff for the loss of the horse in question, and, if so, what is the extent of such liability?

The court instructs you that the defendant is what is known as a common carrier. A common carrier is one who receives property to be transported from one place to another, and, if there is no special contract limiting its liability, is required by law to deliver it in safety at the point to which it is shipped, unless it be lost by the act of God or the public enemy. By act of God is meant such unavoidable accident as can not be prevented by human care, skill or foresight, but results from natural causes, such as lightning, tempests, floods and so forth. By the public enemy is meant those who are opposing or are in arms against the government.

2. *Prima facie case made by delivery of horse.* Therefore, if there was no special contract limiting the defendant's liability, the plaintiff has made out a *prima facie* case when it proves the delivery of the horse to the defendant to be carried for a consideration, and failure to deliver him at Fulton, New York, and the company must then show by producing evidence of equal weight or countervailing force that the failure to deliver the horse was due to an act of God or to the public enemy, to relieve itself from liability.

3. *Death of horse from natural causes during transportation is act of God.* If the horse died from natural causes, from disease, while being transported, then this would be an act of God, and the defendant will not be liable for the loss of the horse, nor would defendant be liable, if the cause of the horse's death was solely due to his peculiar nature or propensities, unless the loss could have been prevented by the exercise of reasonable foresight, vigilance and care, on the part of defendant, for defendant is not an insurer against death arising from the condition of the horse himself. If the horse was seized by the disease known as congestion of the lungs, and not by reason of any fault or negligence of the defendant, died from that disease, his death not being due wholly or in part to the defendant's negligence, this would be a matter beyond the control of the defendant, and in such case that defendant will not be liable for the loss and your verdict should be for defendant.

4. *Duty of company when horse falls in stall.* If however, the horse may have thrown himself in the stall without negligence on the part of the defendant, it would be the duty of the agents of the company to exercise reasonable and ordinary care to relieve him from such condition or situation, and if he died, as contended, from thus being cast in the stall, and from being allowed to remain in that situation for such a time as caused his death, and you further find that by the exercise of reasonable care on the part of the company's agents, the horse could have been liberated from his situation and thereby his death prevented, then the defendant would be liable if it did not exercise such care.

5. *Liability of company if it improperly treated horse.* Furthermore, if after he was taken from the stall, you find that with proper treatment his life could have been saved, and that he was improperly treated and died as a result of such treatment, this would render the defendant company liable, in the absence of a contract limiting its liability, because the defendant will be liable for the loss of the horse, if he was lost by reason of negligence, that is, by reason of not exercising reasonable care, on

the part of the defendant's agents in charge of the horse. And the extent of its liability, if there was no special contract as hereinafter considered, would be the value of the horse with interest from the time it should have been delivered to its destination, but not exceeding the amount claimed in the petition with interest as before mentioned from —, 19—.

But if there was no negligence on the part of defendant resulting in the horse being cast in the stall, nor in relieving him from his situation after being cast in the stall, nor in the treatment of the horse thereafter, the defendant would not be liable, and your verdict should be for the defendant.

6. *Livestock contract—Existence of written contract fixing rights and liabilities for the jury.* The defendant's contention is that there was a written contract between the parties which fixed the rights and liabilities of the parties respecting the shipment of this horse and the jury must determine whether or not these parties entered into such contract, duplicate copies of which have been introduced in evidence as Exhibits 1 and 2, and termed "Limited liability livestock contract." If you find that the parties did not enter into said contract with respect to the shipment of the horse, then the case stands for your determination upon the issues made by the petition and the first defense of the answer, under the evidence applicable thereto and the charge of the court, and you need not consider further the matters set forth in the last four defenses of said answer. But if you find that the parties entered into the alleged livestock contract, and according to the terms of which the horse was shipped, then the issues made by the petition and the first defense of the answer as well as the issues made upon the other four defenses and the reply are to be considered by you in determining defendant's liability, or non-liability for the loss of said horse, for if the horse was shipped pursuant to said livestock contract, the rights and liabilities of the parties are governed by the terms of said contract and it will control in the rendition of your verdict.

On the question as to whether or not the parties entered into the alleged livestock contract and the horse was received and

shipped under the terms of said contract, you will examine into all the facts and circumstances surrounding the parties prior to and at the time of and subsequent to the transaction relating to the shipment of said horse, including what was said and done by the parties. You will consider whether or not the alleged contract was signed, and, if so, by whom, when, where, and why it was signed, and the purpose and object of signing it. Was it with the intention of establishing contractual relations between the parties concerning this horse, or for some other purpose or intention, and, if signed in duplicate what was done with each copy, the circumstances of their disposition, or possession by one or both of the parties, as the case may be; you will also consider on the question of the contract becoming a binding agreement between the parties or otherwise, whether or not the parties had had prior transactions of a like character to this one, whether or not the plaintiff was familiar with the defendant's method of transacting this sort of business, and of contracting for such shipments, whether, on the one hand, there was any concealment, deception, fraud, or unfair conduct, or undue advantage taken on the part of defendant, whereby plaintiff was induced to enter into the contract, if it did so; or, on the other hand, there was no concealment, fraud, deception, unfair conduct, or advantage taken by defendant to induce such contract, but that the contract was freely and fairly made between the parties; whether, on the one hand, the plaintiff, if it executed the contract, in order to have its horse shipped, had no other alternative except by signing the contract in question; or, on the other hand, it may have had its horse shipped by paying a reasonable price therefor to defendant without having entered into said contract, or by entering into a different contract. Applying these and other tests appearing from the facts and circumstances adduced in evidence, if you find that the alleged contract represented by Exhibits 1 and 2 was signed in duplicate by the parties with the intention of the parties to the transaction to make an agreement concerning the shipment of this horse and which agreement was dictated only by their mutual and according wills

and was not induced by fraud, concealment or deception, but was fairly made, you will be justified in finding and it will be your duty to find that the alleged livestock contract was the contract pursuant to which said horse was shipped, and will be upheld as a just and reasonable method of fixing a due proportion between the amount for which the defendant became responsible and the express charge it was to receive, and also of protecting itself against extravagant valuations in case of loss; and a recovery for loss or damage will be limited to the amount of valuation named in the contract, even if the damage or loss occurred through the negligence of the defendant or its servants.

But if you find that the plaintiff did not sign the contract, or, if it signed the contract, there was no mutuality of assent to this live stock contract, as the contract between the parties in relation to this horse, either because of concealment or deception or fraud or undue advantage by defendant or want of voluntary assent by plaintiff, so that the contract was not fairly made, you will be justified in finding and it will be your duty to find that such contract was not the contract between said parties.

To constitute the alleged livestock contract a binding contract between the parties, it was not essential that it be signed at the time of or before the shipment was made. It is sufficient, if it were contemplated between the parties at the time of such shipment that a written contract should be entered into under which the horse was to be shipped, and if in pursuance of such contemplated arrangement, the written contract was signed and delivered as the agreement under which the horse was shipped, it became the binding contract for such shipment, although executed after the horse was shipped.

If you find that the alleged livestock contract represented by Exhibits Nos. 1 and 2 was the contract pursuant to which the horse was shipped, the fact, if it be a fact, that the plaintiff failed to acquaint itself with the contents of said contract will not excuse the plaintiff from being bound by its terms, for it was incumbent upon the plaintiff to acquaint itself with the contents of such contract, if it was executed by the plaintiff, and, although

it failed so to do, it will be held chargeable with the knowledge of such contract, although the circumstance of not reading or familiarizing itself with the contents of said alleged livestock contract will be taken into consideration by you with all the other circumstances in determining whether or not it was the contract under which said horse was shipped.

7. *Same—Contract, if made, to be construed according to laws of another state.* If you find that the alleged livestock contract was the contract under which said horse was shipped, then the court instructs you that by its terms any question arising under said contract was and is to be determined by the law of the state of New York, and certain decisions of the state of New York having been given in evidence to the jury, it is the duty of this court to construe those decisions and deduce from them the rules of law which they establish, and in that view of the case said contract provided that in consideration of the alternative rates offered the shipper upon the basis of the different values to be placed by the shipper upon said horse, and the declaration by the shipper of the value of \$—— placed upon said horse in consideration of certain rates to be charged for shipping him upon that basis, it was agreed that the express company should not be liable for the conduct or acts of the animal to himself as therein specified, nor for loss arising from the condition of the animal himself, or which resulted from his nature or propensities which risks were assumed by the shipper, the plaintiff in this case. And the shipper released and discharged the express company from all liability from delay, injury to, or loss of said animal from any cause whatever, unless such delay, injury or loss was caused by the negligence of the agents or employees of the express company, and in such event the express company was to become liable only to the extent of actual damage, which should in no event exceed the valuation therein declared by the shipper, to-wit, the sum of \$——.

The court instructs you that under the law of the State of New York the defendant had the right to make such a contract with the terms as herein above specified with the plaintiff, and

if made, the same was binding upon the parties thereto, and if the loss or damage to the horse arose solely from the condition of the animal itself, or from its nature and propensities, and not from any negligence on the part of the defendant, the risk of such loss and damage were assumed by the plaintiff and it released and discharged the defendant from all liability for such injury to or loss of said animal from said cause; and if the injury or loss to said animal was caused by the negligence of the agents or employes of the express company, in that event the express company was only liable to the extent of the actual damage, based upon the valuation of the horse fixed by the contract, to-wit, the sum of \$—— with interest thereon from the ——, 19—.

Furthermore, if you determine that the alleged livestock contract represented by Exhibits Nos. 1 and 2 was the contract which bound the parties in the shipment of this horse, there was a provision therein to the effect that in no event should the express company be liable for any loss or damage unless the plaintiff should, within thirty days after such loss or damage accrued, give notice in writing of its claim therefor to said defendant, and that there should be no waiver of the aforesaid time within which said claim should be made, unless the defendant expressly agreed in writing to waive the same. Therefore, if you find the aforesaid livestock contract was the contract under which the horse was shipped and that the written notice required by said contract to be given to the defendant of loss or damage was under all the circumstances reasonable, and that such notice was not given by the plaintiff to the defendant within thirty days after such loss or damage accrued, and that the defendant did not expressly agree in writing to waive such notice, then the plaintiff can not recover in this case and your verdict must be for the defendant.

If you find that the alleged live stock contract was not the contract under which said horse was shipped, then the court instructs you, as heretofore stated in the fore part of this charge, that you will determine the liability or non-liability of the

defendant for the loss of said horse, independent and aside from said contract, according to the instructions heretofore given you with regard to such liability or non-liability in case there was no written contract entered into between the parties.¹

¹McLaughlin in *Bros. v. American Express Co.*, Court of Com. Pleas, Franklin County, Ohio, Rogers, J.

A judgment on a previous verdict was reversed by the circuit court which was affirmed by the supreme court. *McLaughlin Bros. v. American Express Company*, 80 O. S. 704. The foregoing instructions were prepared in accordance with the rules announced in the judgment of the circuit court. This has since been affirmed by the supreme court.

Sec. 1619. Limiting liability by special contract—Burden of proof.

“A carrier may restrict or limit the amount of its liability by a special contract accepted on the part of the owner of the baggage; and this may be done by notices brought home to the owner of the baggage before or at the delivery to the carrier, if assented to by the owner.”

“The onus of proving any qualification of the liability of the defendant as a carrier rests upon it. The notice, to be of any force, must amount to actual notice. At all events to exonerate the defendant as a carrier from its general liability it must be shown at least, by the evidence, that the plaintiff, or those acting for her, assented to the demands of the notice or, with a knowledge of it, acquiesced in it by making no remonstrance.”

“And in determining whether or not the conditions and limitations were brought to the notice of the plaintiff and those acting for her, you will look to all the evidence in the case; as to the manner of the delivery of the ticket and the check; whether anything was said or done calling attention to them or not; whether they were not read at the time of or before the receipt.”¹

¹*Railroad Co. v. Campbell*, 36 O. S. 647.

Sec. 1620. Limiting common-law liability—Burden upon carrier to show loss within an exception.

You are instructed that while a common carrier is permitted by a special contract made with the owner of goods entrusted

to it to restrict or limit its common-law liability so as to exonerate it from losses arising from causes over which it has no control, and to which its fault or negligence in no way contributed, it can not by such a contract relieve itself from responsibility for losses caused by its own negligence or want of care or skill, and the burden rests upon the carrier to show not only a loss within the terms of the exception, but also that proper care and skill were exercised to prevent the loss.¹

¹ *Graham v. Davis*, 4 O. S. 362; *Express Co. v. Graham*, 26 O. S. 598; *Express Co. v. Bachman*, 28 O. S. 144.

Sec. 1621. Not an insurer as to time—Delay caused by unavoidable accident.

You are instructed that a common carrier is not an insurer as to time, but is bound to transport goods to its destination within a reasonable time; and if delay is caused by an inevitable accident, the carrier is not responsible for any loss resulting, if it has used ordinary care under the circumstances. Under such circumstances its duty is to use all reasonable efforts to avoid all unnecessary damage to the property by forwarding it to its destination by other means of conveyance, or in some other way. If the goods are of a perishable nature and it is unable by the exercise of ordinary care to forward it to its place of destination in time to avoid a total loss, it may sell the same for the best obtainable price. If a total loss may have been prevented by sending the goods over another route, it is its duty to do so.¹

¹ *Express Co. v. Smith*, 33 O. S. 511.

Sec. 1622. Duty of carrier as to delivery of goods.

The jury is instructed that as a general rule, when the carrier has done all that the law requires toward effecting a delivery of the property, but is unable to accomplish it, and the property is so necessarily continued in its possession, its obligation becomes that of a depository only. He is no longer an insurer of the property, and may show that it was lost without its fault or negligence, and if the defendant shows by a preponderance of

the evidence that it has done all that it could do towards delivery of the goods, and that they were lost without any fault on its part, it is not liable.¹

¹ *Railroad v. O'Donnell*, 49 O. S. 496.

Sec. 1623. Nondelivery of property—Presumptive evidence of loss by negligence.

Should you find from the evidence that the defendant received the property to be transported for hire as charged in the petition, then it was their duty to cause the same to be safely carried to the place of destination and deliver the same to the person to whom they were consigned, and the fact, should you so find, that these goods were not delivered is presumptive evidence of loss by negligence, and in that case the burden of proof is upon the defendants to show the exercise of due care on their part, for the law exacts of a common carrier a high degree of care. Yet if you find from the evidence that the defendant exercised reasonable care, and that the loss, if any, was occasioned by causes over which it had no control, and not from its own neglect or omission of duty, your verdict must be for the defendant; but if you should fail to find that the defendant did exercise all reasonable care, or that the loss, if any, was occasioned by causes over which it had control, or from its own neglect or omission of duty, your verdict must be for the plaintiff.¹

¹ *Greene, J., in Stevenson v. Wells, Fargo & Co.*

Sec. 1624. Duty of express companies as to delivery of goods.

The undertaking of express companies is to make delivery of goods entrusted to its care for carriage to the consignee personally, with all reasonable dispatch; and to this obligation they are held by the law with great strictness. If there is delay because of some inevitable accident, it will excuse such delay, but the carrier must make delivery as soon as the impediment to the transportation of the property is removed, or can reasonably be overcome.¹

¹ *Railroad v. O'Donnell*, 49 O. S. 489.

Sec. 1625. Carrier of goods—Rule as to limitation of liability.

“A railroad company engaged in the business of transporting live stock assumes all the responsibilities of a common carrier. In the absence of any special contract limiting its liability, it insures against all loss except that caused by the act of God or the public enemy.

“It may limit its liability by a special contract with the shipper or consignor of the property, but such special contract can never relieve the railroad company from liability for its own negligence.”¹

¹ Kansas City R. Co. v. Simpson, 30 Kan. 647.

Sec. 1626. Liability by contract for loss on connecting lines.

“A railroad company may become liable as a common carrier by contract for transportation of passengers and baggage over other railroads, forming with their own a continuous line; and where they do so contract, their liability is the same for losses occasioned by negligence as fault while the baggage is upon such other road as while it is upon their own road.”¹

¹ Railroad Co. v. Campbell, 36 O. S. 647.

Sec. 1627. Duty with regard to baggage—Delivery, etc.

“When a railroad company takes baggage for a passenger, its liability is of the highest sort. It agrees to carry the baggage safely, and insures against all sorts of risks, except the act of God or the public enemy. But when the baggage is landed it is the duty of the owner to call immediately, or as soon as the throng and hurry incident to the arrival and departure of trains has subsided and get his property. But if he fails to thus call, and the agent of the railroad company takes charge of it, then the responsibility will be changed. It will be the responsibility of a warehouseman instead of that of a common carrier. The liability will be to take such care of the property as an ordinarily prudent man would of his own property under like circumstances. All the defendant is required to do is to take

ordinary care under the circumstances, such as men usually exercise in their own concerns. The defendant is not liable for the theft of the goods unless it is the result of the want of proper care.”¹

¹ Penna. Co. v. Miller & Co., 35 O. S. 541. The judgment of the common pleas court in the case from which the above is taken was reversed by the supreme court, but the latter say in their opinion, 35 O. S., p. 550, with reference to this portion of the charge, that “with the general rule thus stated we find no fault; and a less degree of care ought not, in our opinion, to be allowed.” The reversal was based upon other grounds

Sec. 1628. Liability in absence of special contract.

“In the absence of special contract limiting the liability of the defendant, if the jury find that it is liable for loss of plaintiff’s baggage, you will assess as damages the value of the trunk and such of its contents as you find was the wearing apparel of herself or her child, or their necessary or usual appendages or accompaniments of herself and child as travelers, with interest from the demand to the first day of the present term.”¹

¹ Railroad Co. v. Campbell, 36 O. S. 647.

Sec. 1629. Contract for transportation of vegetables.

If the defendant agreed with the plaintiffs that for a certain consideration it would carry a carload of potatoes for them from P. to R., and if, in pursuance of such agreement, the plaintiffs delivered the potatoes to the defendant for that purpose, on the —— day of ——, 19——, it was then the duty of the defendant to forward them to the place of delivery within a reasonable time, and without unnecessary delay, and if it failed to do so, and the plaintiffs suffered loss or damage in consequence of such unreasonable and unnecessary delay, then the defendant would be liable for such loss or damage.

Therefore, if the jury find by a preponderance of the evidence that the defendant agreed with the plaintiffs to transport a carload of potatoes from P. to R.; and further that said potatoes, under said contract, were delivered to the defendant for ship-

ment; and if the jury further find that through the negligence of the defendant the potatoes did not arrive at their destination within a reasonable time after the defendant received them, and in consequence of unreasonable and unnecessary delay, a portion of them froze, then a *prima facie* case is made out in favor of the plaintiffs.

If the delay was not the proximate cause of the freezing, or, in other words, if the potatoes would have frozen even if there had been no delay and they had arrived at their destination in due time, then the defendant would not be liable.¹

¹ DeWitt, J., in *B. & O. R. R. Co. v. Talbott*, S. C. No. 2718, Erie County. See *Hewitt v. C. & C. R. R. Co.*, 18 Am. and Eng. R. R. Cas. 568, where company held liable for loss of potatoes by freezing, the court holding that danger from cold was one which ordinary foresight could have apprehended and guarded against; that great diligence and dispatch were required of the company in the duty of forwarding these perishable articles, and if they were exposed to the danger which injured them through the company's negligence, it is responsible for the damages. See also *Daniels v. Valentine*, 23 O. S. 532; *Canfield v. B. & O.*, 93 N. Y. 532.

Sec. 1630. Delay in delivery of goods—Exempting liability in bill of lading.

If the defendant was guilty of any unreasonable delay in the delivery of the turkeys, and it was the result of its own negligence or want of care and diligence in that behalf, then it is liable for whatever damages the plaintiff thereby sustained. The defendant being a common carrier, it can not, by its bill of lading given to shippers, or in any other way exempt itself from liability for loss or damage arising from failing to deliver the goods shipped within a reasonable time, or at the time stipulated by it for delivery, if there is any such time, if the failure be the result of its own negligence or that of its agent.

No conditions in a bill of lading can bind the shipper unless where it be averred and proven by the carrier that the shipper knew of such conditions and assented to them at or prior to the time of shipment, and such assent must be proven by the carrier. The law will not presume it; and whether there was a bill of

lading given for these turkeys, and the plaintiffs knew of and assented to the conditions, is a question for your determination, and the burden is on the defendant to prove these facts.¹

¹ *American Express Co. v. Hawk*, 51 O. S. 572. Charge affirmed by C. C. & S. C.

Sec. 1631. Bill of lading—Effect of between carrier and shipper—Conditions in—Waiver of.

If, at the time the plaintiffs delivered the potatoes to the defendant for shipment, the receiving agent at P. Station signed a bill of lading and gave it to the plaintiffs, who accepted it and carried it away with them, such bill of lading would have all the force of a written contract between the parties, although it was not signed by the plaintiffs, and if it contained the condition above mentioned, then no right of action could accrue to the plaintiffs, unless they presented their claim for damage within ten days limitation. This condition, however, could be waived by the defendant. If the plaintiffs, exercising reasonable diligence in the premises, were unable to discover and ascertain their loss within ten days from the time of the delivery, or could not, by the exercise of diligence, determine the extent of their loss and damage within the ten days' limit, and if, after the expiration of said ten days, they presented their claim for damage to the defendant's agent, having authority to act for it, and if, at the time the claim was presented to such agent, they had knowledge of the fact that the time specified in the bill of lading, within which the claim could be presented by the plaintiffs, had expired, and if they received such claim, and proceeded to investigate it, and made no objection to its adjustment and payment on the ground that the time within which the claim could be presented had expired, but based the refusal of adjustment and payment on other grounds, then it is the opinion of the court that such facts would constitute a waiver of the performance of said condition on the part of the defendant.

If the defendant did not waive the performance of said condition, then the plaintiffs' failure to present their written de-

mand for damage within ten days would bar their right of recovery; but if the defendant waived it, then it is no defense to this action.

The defendant also claims that said contract contains the following provision: "And the liability of each of the carriers which shall receive these goods for transportation shall be confined to loss or damage occurring on its own line, and shall cease on delivery of the goods to the next carrier."

The plaintiffs also admit that the bill of lading contains this condition.

The defendant insists that it is exempt from liability on the ground that the loss or damage occurred while the potatoes were on the line of another railroad, to which it, the defendant, had delivered the potatoes to be carried from the terminus of its road to R.

The plaintiffs claim that the loss occurred or happened while the potatoes were in the possession of or under the control of the said defendant.

This is a question of fact, and if the jury find that the potatoes were not frozen while on the defendant's line of road, then the defendant is exempt from liability; and if, on the contrary, they find they were frozen while on the defendant's line of road, or before they were delivered to the connecting carrier, then this claim made by the defendants does not exempt it from liability.

If the jury find for the plaintiffs, they, the plaintiffs, will be entitled to recover the value of the potatoes which were frozen. That is, the market value at P. at the time they were delivered to the defendant for shipment.¹

¹ DeWitt, J., in *B. & O. R. R. Co. v. Talbot*, Sup. Ct., No. 2718.

Sec. 1632. Railroad company—Duty to furnish cars for transportation.

You are instructed that it is the duty of the railroad company, as a common carrier, to furnish cars for the transportation of freight, and it must have control over its cars in order to perform its duties to the public. If persons to whom shipments

of goods and merchandise are consigned might hold the cars without unloading, at their pleasure or convenience, and without extra costs or charges, and thus deprive the railroad company of the use of its cars for the transportation of other freight, it is very evident that both the railroad company and the shipping public would suffer serious injury and loss.¹

¹ Van Pelt, J., in *B. & O. Railroad Company v. Swisher*, 1 O. N. P. Rep. 122.

Sec. 1633. Same continued—Duty of company to place cars in suitable places for unloading.

When a car arrives, it is the duty of the servants of the company to place the same in a convenient place for unloading, and if it fails so to do, the period of four days allowed by the rules for unloading does not begin until the car is placed in a convenient and proper place to unload. When a car is once placed in a suitable place for unloading, it is the duty of the servants of the company to keep it so located for the four days which are provided and allowed for unloading; and if the company fails so to do, it can not recover for car service for such car under the rule until the same is placed in a convenient place for unloading, and kept in such a place for the period of four days. In saying that the car must be placed and kept in a convenient place for unloading during the period of four days it is not meant that the car should be kept in the same spot or place on the track during all of the period of four days. If, in receiving their cars from day to day, and in removing cars that have been unloaded, it becomes necessary to shift the position of the car for freight unloading upon the side tracks of the company, such shifting or changing of position will not prevent the company from recovering for car service if the car is not unloaded within the four days, provided it is after such shifting left in a suitable and convenient place for unloading. But if the car is shifted in its position from day to day, and on some days it is in a suitable place for unloading, and on other days not, and is not at any time for the full period of four days kept in a suitable place for unloading, the company

can not recover from the consignor any car service under the rule on account and because of failure to unload the car within the period of four days prescribed by the rules, but he can be held liable for car service on account of his failing to unload within that time.

But if the car is placed and kept in a suitable place for unloading for the full period of four days, and the consignor fails to unload the same within that time, he will be liable for car service after that period, although the car may not at all times thereafter be kept in a convenient place for unloading, unless the servants of the company thereafter unreasonably delay him in unloading by placing the car in an unsuitable place, keeping the same there longer than is reasonably necessary to enable them to accommodate other shippers, and to receive and remove other cars in the transaction of their business. If, however, after the period of four days, the consignor is unreasonably delayed and hindered in the unloading of the cars, the company can not recover service for any day on which he is thus injured and delayed.¹

¹ Van Pelt, J., in *B. & O. Railroad Company v. Swisher*, 1 O. N. P. Rep. 122.

Sec. 1634. Same continued—Duty of company to provide side tracks.

It is the duty of the railroad company operating under such a rule or regulation, to provide at each of its stations where such rule is in force, side tracks sufficient in number and extent to accommodate its business at such station, and to enable its servants to place and keep cars accessible for purposes of unloading. And if such sufficient side tracks are not provided, and because of the want thereby, the servants of the company are unable to keep cars in places convenient for unloading for the period prescribed by the rule, the company can not recover for the car service if the car laid longer than the time allowed without being unloaded.¹

¹ Van Pelt, J., in *B. & O. Railroad Company v. Swisher*, 1 O. N. P. Rep. 122.

Sec. 1635. Same continued—May make reasonable rules concerning the car service.

It is a well-settled rule of law in this state that a railroad company, as a common carrier of freight, may make and enforce all reasonable rules for the convenient transaction of business between itself and those dealing as shippers and consignors.¹

¹ Van Pelt, J., in *B. & O. Railroad Company v. Swisher*, 1 O. N. P. Rep. 122.

Sec. 1636. Same continued—Reasonableness of rules—How determined.

Whether a particular rule or regulation is or is not reasonable in its requirements, is, when the facts are shown, a question of law for the court, and not a question of fact for the jury. You are therefore now instructed that the time allowed for unloading, that is four days, was a reasonable time, and that the amount charged (\$1.00) per day for each day over the period of four days is not excessive, and that the rule or regulation in question, if you find that such a rule or regulation is established by the evidence, was a reasonable one, and is valid in law.¹

¹ Van Pelt, J., in *B. & O. Railroad Company v. Swisher*, 1 O. N. P. Rep. 122.

Sec. 1637. Same continued—Recovery for car service—Effect of rules regulating charges for car service beyond the period allowed for unloading.

But the railroad company can recover for charges for the service of their cars beyond the period which they allow for unloading. It must show by a preponderance of the evidence that the defendant was notified or had actual knowledge of the arrival of the cars and failed to have the same unloaded for more than four days after being thus notified or learning of their arrival. If this fact is not shown as to some one or more of these cars the plaintiff can not recover; but if it is shown, then the plaintiff must go further and prove that it was operating its railroad and shipping merchandise over its lines under

the rule or regulation applicable for shipments to this place, requiring those persons to whom shipments were made who, on learning of their arrival, unloaded the same from the cars within a period of four days thereafter, and that if they failed to so unload their cars within that period that they should pay to the delivering company the sum of one dollar per car per day for all the time over the period of four days so allowed for the unloading of the car.

If you should find that some time before these shipments were made the number of railroad companies doing business in this part of the country, including the plaintiff, B. & O. Railroad Company, had formed or entered into a car service association, and that such association, in order to secure the prompt unloading of cars, had adopted such rule or regulation, this would be the same in effect as if the plaintiff company had in itself adopted the same. But if you find that such rule and regulation was then in force and applicable to shipments to these places, including the shipments of coal and coke, then, if such rule or regulation was reasonable, that is, if it imposes no unreasonable burdens or restrictions upon those receiving shipments here, it was legal and valid and may be enforced by the company. * * *

If the existence of such a rule or regulation is not shown the plaintiff can not recover, for it bases its right to recover on that rule. But if the rule be shown, and also that it was applicable to shipments to this point, and that the defendants on the arrival of the cars were notified, and had obtained actual knowledge of the fact and failed for more than four days to have the same unloaded, or before plaintiff can recover it must appear that defendants had knowledge of such rules or regulations at the time, and it must also be shown by a preponderance of evidence that the cars on their arrival were placed and kept upon a sidetrack of the company in suitable and convenient places for unloading the same by wagons and teams.¹

¹ Van Pelt, J., in *B. & O. Railroad Company v. Swisher*, 1 O. N. P. Rep. 122.

Sec. 1638. Carrier bound to use ordinary care in shipment of live stock when there is delay.

If there was delay in the transportation of the cattle, the defendant was required to use ordinary and reasonable care during the delay for their safety. If the removal of the cattle from the car during the time of the delay, or at any time while in the defendant's possession, became reasonably necessary for their protection from injury, in the exercise of ordinary care for their welfare, and it was possible to remove them by the exercise of ordinary care, then it became and was the duty of the defendant in the exercise of ordinary care to give them such attention as was reasonably and ordinarily necessary for their welfare and protection, during the whole time the cattle were in the possession of defendant. When the defendant contracted to carry the cattle to their destination, the law imposed upon it an obligation to use ordinary and reasonable care in the transportation and delivery of such cattle at their destination, considering the ordinary perils of the road. And if the defendant failed to exercise ordinary and reasonable care in their transportation and delivery of such cattle, and by reason of such failure and neglect, injury was done to such cattle resulting in damage to plaintiff, defendant is responsible for such damage, unless the same was caused by some condition beyond its power to prevent, as by act of God.¹

¹ *Colsch v. Railway*, 149 Iowa, 176, 127 N. W. 198, Am. Ann. Cas. 1912, C. p. 915.

Sec. 1639. Cold weather—Not act of God.

Where cattle are exposed *en route* to a very severe spell of cold weather, in consequence of which they are more or less injured, such cold weather is not within the rule of law considered as an act of God excusing a railroad company from liability for such injury. Such condition ought and might be reasonably foreseen, and if through the negligence of the carrier the shipment of cattle is unnecessarily delayed by reason whereof they sustain injuries by reason of cold and rain, or from ex-

posure to severe and cold weather for an unnecessary length of time, such carrier is liable for damages resulting therefrom.¹

¹ *Railroad v. Smissen*, 31 Tex. Civ. App. 549, 73 S. W. 42; *Am. Ann. Cas.* 1912, C. p. 922, note; *Feinberg v. R. R.*, 52 N. J. L. 451; *Stiles v. R. R. Co.*, 130 Am. St. 451, note. Snow storm. *Herring v. R. R.*, 101 Va. 778, 45 S. E. 322.

Sec. 1640. Baggage—What constitutes.

The term "baggage" includes such items of necessity or convenience as are usually carried by passengers for personal use and comfort or protection during the continuance of a journey, and what constitutes baggage in any given case depends, in some measure, upon its own circumstances.¹

¹ *Railroad v. Johnson*, 50 Colo. 187, 114 Pac. 650, *Am. Ann. Cas.* 1912, C. p. 627. What baggage includes, see note, 99 Am. St. 347.

Sec. 1641. Baggage—Liability of carrier, that of an insurer.

The jury is instructed that the liability of a common carrier when it undertakes to carry baggage of its passengers, for the loss thereof, is that of an insurer except when the loss is occasioned by an act of God or a public enemy. But in the absence of a special agreement therefor the carrier does not incur this liability as insurer, unless the passenger accompanies the baggage in its transportation or is prevented from so doing by the fault of the carrier.¹ The act of God must be the entire cause of the loss, it being essential that the carrier be free from any negligence contributing thereto.²

¹ *Wood v. Railroad*, 98 Me. 98, 56 Atl. 339, 99 Am. St. 339, note p. 345.

² *Sonneborn v. Railway*, 65 S. C. 502. An unusual flood is an act of God. *Long v. Penn. R. Co.*, 147 Pa. St. 343, 30 Am. St. 732.

CHAPTER LXXXVI.

COMPROMISE, SETTLEMENT AND RELEASE.

SEC.

1642. Compromise of cause without knowledge of counsel—Claimed to have been induced by fraud—Burden and proof.

SEC.

1643. Claim of void release of cause for personal injury set up in reply and submitted to jury—Instructions.

Sec. 1642. Compromise of cause without knowledge of counsel—Claimed to have been induced by fraud—Burden and proof.

If you have found upon these propositions in favor of the plaintiff, then you will proceed to inquire and determine the other question, whether a settlement, adjustment or compromise of the cause was made, between the plaintiff and defendant as alleged. The plaintiff had a right to settle, adjust and compromise the action which had been commenced, without first taking the counsel, advice or consent of his attorney, and without reference to the views or wishes of his attorney. To constitute a valid settlement, it must have been understood between the parties at the time it was made; their minds must have met upon the proposition which was made with reference to a settlement on the one hand and the acceptance thereof by the other. The plaintiff claims that no such settlement was made, and the question must be decided by the jury. If you find a settlement was made as claimed by the defendant, and that the same was complied with upon their part, then you need inquire no further, but should return a verdict for the defendant. But if, on the other hand, you find that a settlement was not thus made, but was brought about as is claimed by the plaintiff, by fraud practiced upon him, and by reason of false representa-

tion made to him at the time; that he was induced by reason of fraud thus practiced, and representations thus made, to enter into an arrangement, agreement and settlement which was then made, this would not constitute a settlement between the parties, and upon this proposition you should find for the plaintiff.

The burden of proof upon the question of settlement is upon the defendant, but so far as the introduction of the paper writing by the defendant is concerned, or the paper purporting to have been executed and signed by him, it would be *prima facie* evidence of the making of such settlement, that is, if you find that he signed the paper writing that is offered in evidence, and in determining the question whether fraud was practiced upon him, upon that question, the burden of proof would rest upon the plaintiff, and you must remember that fraud is not to be presumed—it must be shown and established by a preponderance of the evidence upon the part of the plaintiff, proven as any other fact in the case.¹

¹ Pennsylvania Co. v. Lombardo, 49 O. S. 1.

**Sec. 1643. Claim of void release of cause for personal injury
may be set up in reply and submitted to jury
—Instructions.**

Your attention is first called to the receipt and release pleaded in full by the defendants in their answer and which I have already read to you. On its face it purports to be a receipt for \$—— in full satisfaction and discharge of all claims accrued or to accrue in respect of all injuries or injurious results, direct or indirect, arising or to arise from the accident complained of by plaintiff. The signing of such a receipt and release constitutes in law *prima facie* evidence of its due execution and validity. That simply means that on the face of things it is a valid release and unless something is offered by way of rebutting the same, why, of course it was to be taken for granted that the release was valid and lawful. Therefore the burden rests upon the plaintiff to show that the release was fraudulently obtained so as to render it void. The plaintiff can recover in

this case only in the event that he proves to you that this release was void.

The release is set up in the answer by the defendants and attacked by allegations by the plaintiff in his reply to the effect that his signature was fraudulently obtained thereto by representations made to him by defendants that said writing was merely a receipt for wages due him, upon which he says he relied without reading the same or knowing what it contained. This presented, in the judgment of the court, a proper case to go to the jury without having alleged tender of the amount paid—that is, without the plaintiff having actually tendered back to the defendants the \$—— and having alleged that in his pleading; because if such allegations are proved as claimed and alleged by the plaintiff the release is void.

1. *Void or voidable release.* That the jury may understand its function and duty in determining the question of fact concerning the release, whether it is void or not, or whether it is voidable only, your attention is called to the distinction between a void release and a voidable one. A release which is signed without knowing its contents upon false representations as to its contents made under such circumstances as will excuse the person from reading the same, or as would warrant the person in relying upon the representations made, and which representations were of such character as to throw the party, the plaintiff in this case, off his guard, would be void. If, for example, plaintiff believed, as he claims he did, that the paper which he signed was a receipt for money advanced to him by defendants during his disability for his time lost, and that it represented merely the amount so paid to him during that period and for that purpose, and was intended to merely show where the money went, and that the plaintiff did not know that it embraced anything else in its terms, then it would be void and the jury, if they find those facts to exist, would be justified in finding the release to be void and therefore of no legal effect. If, on the other hand, at and prior to the execution of the paper plaintiff and defendants together considered and discussed the matter of the advancement of the money by defendants to plaintiff, and the disposition of the

obligation of plaintiff to defendants therefor; if the jury find that there was such an obligation of release—and that the matter was considered by the parties in connection with the injury which plaintiff had suffered, and in connection with his right of action in a court of law for the recovery of damages therefor; and if the final result of such consideration and discussion between the parties was that the receipt and release was signed, and with full knowledge of all these matters, partly in consideration of the money so advanced, as well as by way of a release of the obligation of plaintiff therefor by defendants, but that the plaintiff did not read the paper and did not know and fully appreciate the full contents and effect of the receipt and release, and did not know that it was in effect an absolute release of his claim for damages resulting from the injury, then the release would be voidable only. That is, it could be declared and held void only upon the election made or exercised by the plaintiff.

2. *Election to declare release void.* In order to exercise such right of election, that is to declare the instrument void, plaintiff would have had to have brought a proper action in a court of equity, as we call it, setting forth sufficient grounds for the annulment of the release. As a condition precedent to making such election and bringing such an action, plaintiff would had to have restored to defendants what they had paid to him, to-wit, the \$——; he would had to have tendered the money back to the defendants, not only before the action, but he would had to have alleged in his pleading that he had so tendered it back, and as well to tender it in court in order to have made out a cause of action for the annulment of that release, which it would have been essential to bring before he could have maintained his action for the recovery of damages. You understand, gentlemen, that would be necessary in the event that this release is voidable only, and I have endeavored to state the matter to you as clearly as possible in the light of the evidence to enable you to determine the character of the release, whether it is void or voidable.

The plaintiff has made no tender in this case, nor has he sought to have the release annulled.

The defendant having averred the release in his answer, the plaintiff has brought himself within the established rule of procedure in such case by averments in his reply claiming it to be a void release. Where a plaintiff in an action like this, claims that an alleged release given by him to be void, the rule is, that he need not claim it to be void in his petition, but he need pay no attention to it unless the defendant sets it up in his answer. In the reply plaintiff may attack the release on the grounds that it is void; he may introduce testimony touching the same, and the question then may be submitted to the jury; and in this case therefore he—the plaintiff—is confined and limited, so far as recovery in this action is concerned, solely to the theory that this release is void, and the question submitted to you is whether the evidence shows it to be void.

Governed and guided by these instructions, the jury will determine whether the release is void. In reaching a conclusion on this matter you will have to determine whether the evidence shows it to be voidable or void.

If you are of the opinion that the release is only voidable, that is under your consideration of the case, because of no tender having been made and no release in equity having been sought in this action, the plaintiff can not recover, and it would be your duty to at once render a verdict for the defendants without any further consideration of any other question in the case.

If you are of the opinion that the release is void, no tender back of the money having been necessary in such a case, the plaintiff will not therefore be precluded from recovery by reason of such release, and you may then, in that event, proceed to consider and determine the question of negligence charged.¹

¹ *Easton v. Robinson*, Franklin Co. Com. Pl., Kinkead, J., affirmed by Circuit Court.

A void release of a cause for personal injury is not a bar. Plaintiff may make the claim in the reply. If voidable only, he can not maintain the action until the release is set aside. The cancellation of release and claim for injury may be united. *Perry v. O'Neil Co.*, 78 O. S. 200. See *Insurance Co. v. Burke*, 69 O. S. 294; *Ins. Co. v. Hull*, 51 O. S. 270.

CHAPTER LXXXVII.

CONTRACTS.

(See CONTRACTS FOR PERSONAL SERVICES—BUILDING CONTRACTS.)

SEC.

1644. Meeting of minds.

1645. Contract by ratification when no meeting of minds in the beginning.

1646. Consideration.

1647. Contracts, express or implied.

1648. Contract made under duress or compulsion.

1649. Consideration, exclusive right to patented invention.

1650. Words applied to trade—"New dress" for paper—Construction for jury.

1651. Implied contract to be found by jury.

1652. Parol evidence to vary written instrument.

SEC.

1653. Latent ambiguity in contract.

1654. Latent ambiguity in oral contract.

1655. Defense of illegality of contract.

1656. Meaning of contract to construct and furnish a thing of the "finest quality," for the jury, when.

1657. Action for breach of covenant of lease, for failure to repair, maintain and surrender premises. "Reasonable use," "Reasonable wear."

Sec. 1644. Meeting of minds.

The jury is instructed that the meeting of the minds of the parties upon its terms is necessary to the making of a contract. If the minds of the parties have not met on any terms of agreement, there is no contract; and this is so whether the contract is claimed to be express or implied.¹

¹ *Railway v. Gaffney*, 65 O. S. 104.

Sec. 1645. Contract by ratification when no meeting of minds in the beginning.

The jury is instructed that where a contract is entered into without full and complete understanding between the parties of all its terms and conditions, it still may be made a valid and

binding contract by acts, declarations and conduct if of sufficient tenor and effect as to show a full understanding and agreement between the parties on the essential terms thereof. Hence it follows that acts, declarations and conduct subsequent to an incomplete understanding if clearly referable to a complete and mutual understanding between the parties, will constitute a ratification of a prior contract entered into between the parties without full accord and agreement.

So the jury is instructed that though there may not have been an entire mutual understanding between the parties in the beginning, still if the acts, declarations and conduct of the defendant shows that he ratified the contract in all the terms after they were fully understood by him, then you will be warranted in finding that a contract was entered into.¹

¹ *Phelps v. Pratt*, 225 Ill. 85, 80 N. E. 69, 9 L. R. A. (N.S.) 945; *Anderson v. Anderson*, 251 Ill. 415, 96 N. E. 265; *Am. Ann. Cas.* 1912 C.

Sec. 1646. Consideration.

You are instructed that whatever works a benefit to the party promising, or whatever works any loss or disadvantage to the person to whom the promise is made, is a sufficient consideration to support a contract. One promise is a good consideration for another promise.

It is necessary that the consideration of a promise be of some value, but the law will not enter into the question of the adequacy of the consideration, except where the inadequacy is so great as to raise the implication of fraud or imposition.¹

¹ *Judy v. Louderman*, 48 O. S. 562.

Sec. 1647. Contracts express or implied.

Contracts are either express or implied. In general, the **only** difference between an express and an implied contract is in the mode of proof. An express contract is proved by evidence of the express words used by the parties. An implied contract is established by proof of circumstances, showing that either in justice and honesty, a contract ought to be implied, or that the

parties intended to contract. Whether the contract be established by evidence direct or circumstantial, the legal consequences must be the same.

The inference of an implied contract is eminently a practical matter for the application of the sense and judgment of the jury, however, to be guided in that respect by our instructions to you, and the evidence, viewed in the light of all the surrounding circumstances submitted to you, and keeping in mind the fact that the written contract must prevail as to all matters concerning which they speak, unless modified by the agreement of the parties made subject to their execution and delivery.¹

¹ Voris, J., in *Wilhelm v. Colohan*, Summit Co. Com. Pleas.

Sec. 1648. Contract made under duress or compulsion.

“A contract made under compulsion may be avoided by the party by whom it was executed. Compulsion, however, to have that effect, must amount to what the law calls duress. Mere anger, or profane words, or strong, earnest language, can not constitute such compulsion as will amount to duress, or enable a party to be relieved from his contract. There may, however, be duress by threats. Duress by threats does not exist where a party has entered into a contract under the influence of the threat, or only where such threat may excite or reasonably excite, a fear of some grievous wrong, as bodily injury or unlawful imprisonment.”¹

¹ *Adams v. Stringer*, 78 Ind. 180.

Sec. 1649. Consideration—Exclusive right to patented invention.

The contract under which this suit is brought, in order to be binding, must be founded upon a sufficient consideration. We mean by consideration, the price, motive, or inducement that led the parties to enter the contract. The consideration for which the defendants say that they entered into the contract

set out in the petition was the sale and transfer by plaintiffs to them of the exclusive right to manufacture and sell a patented invention of the plaintiff, which plaintiffs represented to be a new and useful attachment, and of great value for sewing machines, for converting reciprocating to rotary motion, for which plaintiffs had secured letters patent of the United States, and of which plaintiffs were the owners.

If you find the plaintiffs' invention to be capable of being applied to some practical or beneficial use, and is not frivolous, without regard to the degree of utility, this would constitute a sufficient consideration to support the promise of defendants to pay the royalties stipulated for. But if you find that it is not capable of being applied to some practical or beneficial use, and is frivolous, and the attachment could not be sold to the unsuspecting public without committing a fraud, and for which there could be no practical markets where its merits were known, then the transfer of the right to manufacture and sell under said letters patent would not constitute a sufficient consideration to support said promises.¹

¹ Voris, J., in *Kremer v. Hitchcock*, Summit County Common Pleas. A patented invention which is capable of being applied to some practical or beneficial use, and is not frivolous or injurious to the well-being of society is valid without regard to the degree of its utility, and an interest therein constitutes a sufficient consideration for a promissory note or other contract. *Tod v. Wick*, 26 O. S. 370.

Sec. 1650. Words applied to trade—"New dress" for paper— Construction for jury.

It is a general rule, that in the construction of contracts language is to be given its plain, popular and ordinary signification; you are to give to the language or the words used by the parties at the time of the making of the contract, their plain, popular and usual signification, unless it appears that the words have a peculiar meaning common to a certain trade or profession. If you find that the contract is as plaintiff claims, that the words "new dress," as used in this contract, have a peculiar meaning common only to the trade or profes-

sion of publishing and printing a newspaper, you will give to these words that meaning in considering this contract, the meaning that is common to that trade or profession, that is, the trade or profession of publishing and printing a newspaper. You will ascertain the meaning that is to be given to the words from the testimony; you are to look to the testimony and ascertain what peculiar significance these words have in that trade or profession, and in considering further, if you find the contract was made, you will give to these words the meaning as they are used in that profession or trade.¹

¹ *Gaumer v. Riley*, Supreme Court, unreported, Driggs, J.

Sec. 1651. Implied contract to be found by jury.

The jury is instructed that an implied contract is one which the jury may fairly infer, as a matter of fact, to be existent between parties, explanatory of the relation existing between them. Such implied contracts are not generally different from express contracts, the difference being simply in the mode of proof. Express contracts are proved by showing that the terms were expressly agreed on by the parties, whilst in implied contracts the terms are inferred as a matter of fact from the facts and circumstances surrounding the parties, making it reasonable that a contract existed between them by tacit understanding.

The jury will, therefore, look to the facts and circumstances disclosed by the evidence and determine whether the parties in this case entered into a contract, and if the evidence establishes the fact that the parties understood that each sustained to the other a contractual relation, then the jury will be justified in determining that a contract was made.¹

¹ *Railway v. Gaffney*, 65 O. S. 104, 114-15.

Sec. 1652. Parol evidence to vary written instrument.

It is well settled, as a general rule, that all parol—that is, verbal—negotiations between the parties to a written contract, such as a promissory note or other instrument anterior to, or

contemporaneous with, the execution of the instrument, are to be regarded as either merged in it or concluded by it. Accordingly, parol evidence is incompetent to show terms or conditions at variance with, or in addition to, a written agreement which the parties agreed to verbally, prior to or at the time the contract was reduced to writing, but which were not inserted in the instrument. But to this general rule there are certain exceptions.

Thus, parol evidence is admissible to prove that the written agreement, or promise, was without consideration, or what the consideration in fact was; and parol evidence is admissible to show that the writing was never intended to operate as an agreement at all; that the writing was not accepted as the record of any contract.¹

¹ E. P. Evans, J., in *Lillie v. Bates*, Sup. Court, No. 1636. See 3 O. C. C. 94, 26 O. S. 33.

Sec. 1653. Latent ambiguity in contract.

The law is that when parties have reduced their agreement to writing that the terms and conditions of their contract shall govern and control their rights, and when the meaning and intent thereof can be ascertained and determined by the provisions of the contract itself and there is no ambiguity in its terms, then it is the duty of the court to determine the meaning.

But in this case the full import and meaning of this contract can not be determined without the aid of extrinsic evidence outside and apart of the contract itself. There being what is termed in law a latent ambiguity in the contract, it becomes the duty of the court to submit the question of what the parties meant by their contract in the provision [here state the provision, as—] relating to thoroughly overhauling the cars and delivering them in good condition, as well as to determine whether the defendants did or did not comply with their contract.

The jury must therefore determine what the contract under all the circumstances meant. It will be your duty to take into

consideration all the facts and circumstances at the time the contract was made, as well as all that was said and done by the parties throughout the entire transaction, that is from the beginning of the negotiations, from the facts and circumstances and conversations when the contract was made, and the acts throughout the transaction.

You should also consider the purpose and intent of the parties at the time they made the contract for the sale and exchange of the property, the uses and purposes, which each of the parties intended to make of the property, the nature and condition of the cars when they were sold, and when delivered; whether they were or were not thoroughly overhauled and delivered to plaintiff in good condition as contemplated by the contract made by the parties.¹

¹ Cincinnati Equipment Co. v. Kauffman, Fr. Co. Com. Pleas, Kinkead, J.

Sec. 1654. Latent ambiguity in oral contract.

Gentlemen of the jury, this cause of action being founded upon an oral contract, claimed to rest upon the language of the witnesses to the effect that the decedent agreed that if plaintiff would take care of him the remainder of his life, he would pay her well, being what is termed in law latently ambiguous, the latency of the contract not appearing upon its face, that is, you will have to look to the surrounding circumstances in order to determine the meaning, it is, therefore, the province of the jury to interpret its meaning in the light of all the surrounding circumstances and facts, as well as by the conduct of the parties, and the declarations of either of them, if any have been made, as well as by the general course of dealings between the plaintiff and the decedent. You may or you may not consider the mode of living under the circumstances which the evidence shows that these parties lived, where they lived, and the kind of service that would be contemplated and furnished under such circumstances and conditions and in the place where the parties lived.¹

¹ Cornwell v. Agler, as administrator, etc., Franklin Co. Com. Pleas., Kinkead, J.

Sec. 1655. Defense of illegality of contract.

“If the jury shall find from the testimony that, on or about the time stated in the petition, the defendant received from the plaintiff a certain sum of money under an arrangement that the same should be invested by the defendant in wheat transactions, illegal in their character, for the benefit of the plaintiff; that said money was so invested by the defendant, and a profit realized thereon; and that before the commencement of this action said sum of money and the profits so made came into and are still in the hands of the defendant; or that he received credit therefor in the final settlement of his accounts with the brokers through whom said business was transacted, then the plaintiff is entitled to recover said money from the defendant; nor, in such case, can the defendant avoid his liability to account for said moneys by showing that, by the understanding between the plaintiff and himself, said money was to be employed in illegal transactions in wheat, of the nature stated in his answer, and that said money was employed, and said profits realized in such transactions.”¹

¹ Norton v. Blinn, 39 O. S. 145.

Sec. 1656. Meaning of contract to construct and finish a thing of the “finest quality,” for the jury when.

Ordinarily the construction of a contract is for the court, but where words in a contract may have a particular meaning attached to them according to the trade which may be concerned, or referred to in the contract, and where the meaning may vary according to the extrinsic facts and circumstances,—that is the facts and circumstances outside of the contract and those relating to the subject matter of the contract, then it is for the jury to determine what the meaning of the contract is.

The contract here is that the plaintiff undertook to construct and erect a granite monument which was to be executed in the best of workmanship, from the finest quality of the above-named material. Quality is a term employed as denoting grade, in-

gredients or properties of an article. It indicates generally the merit or excellence of the article.¹ Now you are to determine in the light of all circumstances, and in the light of what quality is used for this purpose, that is the construction of a monument, what the finest quality of granite means. You may take into consideration also the fact, if you find it to be a fact, that the parties examined and saw samples of the quality to be used. I think I need say nothing further with reference to the testimony, but it is a matter entirely within your province to determine what the contract was, and whether or not the contract has been performed according to its terms and conditions.

It is incumbent upon the plaintiff, to make out his case, to show that he has performed all of the obligations on his part to be performed. That is, it must appear by the preponderance of the evidence that he has furnished the kind of monument which the contract, as you will find it to be and mean, required of him. If he has established that by a preponderance of the evidence, then he is entitled to recover the amount claimed in his petition.²

¹ Quality means "essential property; characteristic; degree of goodness; capacity." Quality is a term employed as denoting the grade, ingredients, or properties of an article. It indicates generally the merit or excellence of the article. *State v. Martin*, 66 Ark. 343, 28 L. R. A. 153; *Dennison Mfg. Co. v. Mfg. Co.*, 94 Fed. 651, 657.

² *Haynes v. Kost*, Franklin Co. Com. Pleas, Kinkead, J.

**Sec. 1657. Action for breach of covenant of lease—For failure to repair, maintain and surrender premises—
"Reasonable use"—"Reasonable wear."**

The claim of the plaintiff is based on an alleged failure of defendants to repair, maintain and surrender the plant, premises and property described in the petition in the condition provided for in the contract of lease, sued on; and to erect, maintain in good condition and so surrender certain other property therein provided for.

The covenant of lease introduced in evidence, on which the recovery, if any, must be had, provides:

1. That the second party agreed to take the property demised in its then present condition and at its own expense to place the said furnaces, blowing engines, hot-blast stoves, fittings, buildings and appurtenances, the reservoir and railway tracks in good working order and repair and so maintain them during the term of the lease and at the expiration of said term or other determination of the lease to quit and surrender the premises demised in as good state and condition as reasonable use and wear thereof would permit, and that all losses by fire during the continuance of the lease should be repaired and made good by the party of the second part.

2. That said second party would furnish and erect at its own expense new boilers, hoisting engine, two pumps, hot-blast stove, and all buildings, machinery and appurtenances which might be necessary for the proper and economical running of the iron-making plant, all which were to be maintained in good condition during the term of the lease and so surrendered at its expiration or other determination thereof, except the hoisting engine and two pumps, which the said party was at liberty to remove.

The instrument sued on in this case was not executed agreeably to the provision of the statutes of this state, in that the acknowledgment of same was not certified on the same sheet on which the instrument is written or printed. But it is not in dispute that the second party thereto entered thereunder, used and occupied said plant and premises to ———.

Where tenants enter under a lease which is invalid by reason of said statute or otherwise, their tenancy is nevertheless subject to the covenants relative to repair, maintenance, erection and surrender on the part of lessee in such an instrument. And when the lessee has entered under the lease and occupied and enjoyed the premises, he is estopped to repudiate the lease on the ground of invalidity.

I charge you that notwithstanding the irregular manner of the execution of the lease in question as to its acknowledgment, nevertheless, the second party thereto is bound by the stipula-

tion of the lease relative to the repair, maintenance, erection and surrender of the premises therein described; entry and possession having been had according to the terms of the instrument.

By stipulation of the lease, it was the duty of the second party thereto, at its own expense, to place the property described in the first covenant mentioned, in good working order and repair, and so to maintain same during the term of the lease and at its expiration to surrender same in as good state and condition as reasonable use and wear thereof would permit.

The court has heretofore charged you, prior to the arguments of counsel, as to the liability of defendants in case you find they did not place the property specified and described in said first covenant mentioned or any of it in good working order and repair; or did not so maintain same or any of it until ———, and thereupon so surrender same in as good state and condition as reasonable use and wear thereof would permit.

In that connection, if you find from the evidence that the said defendants or any of them, placed the property in the said first covenant alleged, in good working order and repair and so maintained same during the lease, and surrendered the same in as good state and condition as reasonable use and wear thereof would permit, then defendants are not liable in that behalf.

“Reasonable use” is that which does not unreasonably prejudice the rights of others.

“Reasonable wear” means such decay or depreciation in value of the property as may arise from ordinary and reasonable use.

In determining what is reasonable use and wear referred to in the lease introduced in evidence, you will look to the surrounding circumstances in connection with the making of said lease, the use for which the plant and premises were leased, and all the circumstances connected therewith and known to the parties, as revealed by the evidence.

By stipulation of the lease in question, the second party thereto was bound at its own expense to furnish and erect new boilers, a hot-blast stove, and all buildings, machinery and ap-

purtenances which might be necessary for the proper and economical running of the iron-making plant, which were to be maintained in good condition during the term of the lease and so surrendered at its expiration.

It is the claim of the plaintiff that in violation of the second covenant of the lease alleged, that the hot-blast stove agreed to be erected by defendants, was not there at the surrender of the lease; that the electric light plant had been removed; that the boilers were worthless; that certain machinery fittings and appurtenances, including a large number of bosh plates, coolers, tuyeres, cinder coolers, monkeys, pipes and fittings, furnished by defendants in partial compliance with their covenant, had been torn out and removed.

The court charges you that the furnishing and erecting of the hot-blast stove, stipulated for in the covenant just mentioned, did not depend upon what might be necessary for the proper and economical running of the iron plant. The agreement to furnish and erect said stove was unconditional, and in any event the plaintiff is entitled to recover the cost of erecting such hot-blast stove on the leased premises on ———, if you find it was not erected by defendant. The agreement to furnish new boilers is likewise unconditional.

Where one does not specify the time within which the lessee is to make improvements, he has the whole term within which to make them; and the measure of damages for a breach of the tenant's agreement to erect improvements to be made during the term, is the cost of making them. Following the stipulation for the new boilers and hot-blast stove in the covenant just mentioned, the agreement to furnish and erect "buildings, machinery and appurtenances" therein mentioned, is conditional upon their being necessary for the proper and economical running of the iron-making plant; but not so as to the hot-blast stove and new boilers as hereinbefore charged.

Appurtenances are things belonging to another thing as principal and which pass as incident to the principal thing.

Whether or not the electric light plant, the bosh plates, coolers, tuyeres, cinder coolers, monkeys, pipes and fittings in ques-

tion were included in the machinery and appurtenances, and were necessary for the proper and economical running of the iron plant, is for you to determine from all the evidence bearing on that matter.

The court has heretofore, prior to the arguments of counsel, charged you as to the liability of defendants in case you find the defendants did furnish and erect new boilers, and failed to maintain and surrender same in good condition, or boilers which were not new when erected, and not placed in good condition at surrender, if you so find; and in case defendants furnished any buildings, machinery or appurtenances which were necessary for the proper and economical running of the iron plant and did not maintain them in good condition until —, 19—, or did not then surrender up same in good condition.

In that connection, if you find from the evidence that said defendants furnished and erected new boilers, as stipulated for in said second covenant of the lease contract, and all buildings, machinery and appurtenances necessary for the proper and economical running of the iron-making plant, and maintained same in good condition during the term of the lease, and so surrendered same at the termination of the lease of —, 1905, then defendants are not liable for damage for the property so erected, maintained in good condition and so surrendered on —, 19—. ¹

¹ Ohio Mining & Mfg. Co. v. Miller, Franklin Co. Com. Pl., Rathmell, J. Affirmed by circuit court.

CHAPTER LXXXVIII.

CONTRACTS—FOR PERSONAL SERVICES.

SEC.

1658. Action on contract for support of parent.

1659. Contract to perform services by one taken into family when a child must be shown.

1660. Services of child for parent—Capacity of parent to make contract—Child as member of family.

1661. Contract of service made by correspondence.

1662.. Contracts, express or implied—Proof of.

1663. Contract for services when implied.

1664. When the relation is that of brother or sister, or parent and child, burden upon one claiming relation of contract of service to prove it, and to rebut presumption that it was gratuitous.

SEC.

1665. Service rendered by grandchild to grandparent.

1. Request to perform service—Implied from circumstances.

2. Circumstances negating promise—Gratuitous service—Relation of child and parent.

1666. Contract for services between employee and corporation.

1667. Action for services by wife against executor of deceased father-in-law.

1. When parent resides with child—Services by former presumed gratuitous.

2. Husband entitled to personal service of wife.

3. Contract must be shown to warrant recovery.

4. Whether services gratuitous.

5. Estoppel to claim compensation for services.

Sec. 1658. Action on contract for support of parent.

While a child may be morally bound to care for, support, and maintain a mother, who, through the long and weary nights or days has nursed the child during its infancy and childhood, yet no such legal obligation rests upon him. In other words, a child is not bound to support and maintain a parent in his old and declining days.

Therefore, primarily, neither S. W. nor his wife, M. W., was bound to support, maintain, and care for this old lady in her declining years; primarily, M. C. was bound to pay the plaintiff in this case for the services rendered to her during her declining years, and there can be no recovery in this case against the defendant, unless the jury find by a preponderance of the evidence that the defendant, W. C., did promise to pay the plaintiff for the care, sustenance, nursing and support of M. C., and that by reason of this promise made by the defendant, W. C., he, the plaintiff, did care for, nurse, support and maintain M. C.

If the jury find from the evidence that the defendant did promise to pay for the support, maintenance, and care of this old lady, and that by reason of that promise he, the plaintiff, did support, maintain, nurse, and care for her, your verdict will be for the plaintiff, as to this issue; but if the evidence fails to show that the defendant did promise to pay, for the support, care, nursing and maintenance of this old lady, and that in pursuance of that promise, he did perform those services, your verdict must be for the defendant, and your duties will then be at an end.

No particular form of words is necessary to constitute a valid and binding contract; if a promise is made upon one side, and entered upon and acted upon by the other, this will be sufficient to make it a binding contract.

In other words, it is not necessary in making a promise to pay for a particular service that a certain form of words of acceptance of a proposition should be used; it is enough if one has made a promise that the other shall enter upon and perform the services for which the promise to pay is made. In such case, if the minds of the two parties actually come together at the time the promise was made, and the services were performed in consideration of that promise, this will be sufficient to make it a good, binding and valid contract.

If, therefore, you find that this promise was made by W. C., and that S. W. accepted it, and that he performed the services,

or that they were performed by his wife and children (under the restrictions that I shall hereafter speak of), and that he has not been paid for them, the plaintiff would be entitled to recover the reasonable and fair value of the services so performed by him, his wife, or his daughter, and for the value of the board and clothing and medical attendance that was furnished by him.¹

¹ Campbell v. Woodward, Sup. Ct. No. 2834. Judgments affirmed. Joseph W. O'Neill, J.

Sec. 1659. Contract to perform services by one taken into family when a child must be shown.

The jury is instructed that one who is received in infancy as a child, into a family not of kin to her, and remains in the household after her majority, must, in order to recover for her services rendered such family after her majority, show either an express contract, or circumstances from which a contract to compensate her for such services may be implied.¹

¹ Howard v. Randolph, 134 Ga. 691, 29 L. R. A. 294.

Sec. 1660. Services of child for parent—Capacity of parent to make contract—Child as member of family.

It is claimed by plaintiff that he had been away from his father's home, doing for himself and family for about twenty-two years, for twelve years of which time, prior to the attack of paralysis, by which his father was afflicted, residing in the State of Michigan, and that upon the occurrence of the attack he was telegraphed to, and *at the instance and request of his father* that he immediately came to his father's house, and at the instance and request of his father, he being then helpless and wholly unable to get up or walk, or to help himself, or to attend to the wants of nature, and that during the space of seven hundred and ninety-six days, between the ——— and the ———, that he nursed and cared for his said father by handling, lifting and nursing and caring for him day and night during all that time, for which services he claims judgment.

To the claim of plaintiff thus set forth the defendant says that whatever services the plaintiff rendered in taking care of and nursing his father, were done and performed by him as a son and member of his family, and without any promise of payment by his father, and without any expectations of payment for said services.

1. *Right of son remaining in his father's house to recover for his services.* (On the issue thus presented the rule is that where a son, during his minority, or even after his arrival of age, remains in his father's house, as a member of his father's family, and performs labor for his father without a promise of payment for the same by his father, that there can be no recovery. In other words, that unless there is a promise of payment by the father, and an expectation of payment by the son, there can be no recovery for services rendered by a son for his father, even after he becomes of age, while living with his father as a member of the family.)¹

In this case it is claimed by plaintiff that the above rule does not apply, for the reason that the plaintiff was away from his father's home twenty-two years, taking care of himself, and further that by reason of the imbecility of mind of his father, and his helpless physical condition, that he was compelled, of necessity, to perform for his father the services that he rendered, and that in such case the law implies a contract that he should be paid for his services.

You will look at all the testimony offered on this question for the purpose of determining in what manner the plaintiff lived there during his father's illness. Did plaintiff, at the time he rendered these services, render them as a gratuity and a member of his father's family? If he did, then there can be no recovery.

2. *Capacity to make contract.* If you find that J. N. was mentally incapable of making a contract for services for his care and nursing, and that such services were rendered by plaintiff, and that the same were necessary, and that, while so rendering them, plaintiff expected payment for the same, he would be entitled to receive payment unless you find from the testimony that plaintiff was, during the time the services were being

rendered, a member of his father's family, treated in every respect by the family by being furnished with clothing, spending-money, and everything as a member of his father's family the same as was furnished to the other members of the family, and that he was so regarded and treated by the family, and that he so acted and demeaned himself and acted as a member of said family. But in such case, the plaintiff having been absent for a great many years, doing for himself, the burden is on the defendant to prove that he became, while there waiting on his father, a member of his father's family. For this purpose you may look to the manner in which he, the plaintiff, and the other members of the family all lived together and acted towards each other.²

¹ "It is well settled in Ohio that a child residing with his father as a member of the family is not entitled to recover for work and labor performed, or services rendered in the absence of an express agreement to pay therefor, or its equivalent." Wright, 89 and 134; Pollock v. Pollock, 2 O. C. C. 143; Hawthorne v. McClure, 4 O. C. C. 13. In Ulrich v. Ulrich, 136 N. Y. 120, it was held that as matter of law no presumption that the services were gratuitous arises.

² From Nesbitt v. Knoop, supreme court, unreported. In Reando v. Mosplay, 59 Am. Rep. 15 (Mo.), services were rendered for an insane parent. The court said that an implied contract might arise between an insane person and one furnishing necessities, and further charged that:

"If you believe and find from the evidence in this case that plaintiff rendered the services sued for as acts of gratuitous kindness to her mother, and as a member of the family, with no intention of charging her for the same, then you must find the issues for the defendant, and in such case it makes no difference how meritorious and how valuable her service to her mother may have been."

There is no controversy over the doctrine that where a child, though over age, continues to reside with his parent after becoming of age, and is treated as a member of the family, so long as that relation exists the law implies no promise to pay. Miller v. Miller, 16 Ill. 296; Hart v. Hess, 41 Mo. 441; Wells v. Perkins, 43 Wis. 160; Adams v. Adams, 23 Ind. 50; Smith v. Smith, 30 N. J. Eq. 564; Wright's Rep. 89, 133, 547, 751. Under such circumstances to entitle the child to recover, he must prove, by preponderance of evidence, an express hiring, or promise to pay, or circumstances from which a hiring or promise may be reasonably inferred. Steel v. Steel, 12 Pa. St. 64; Hiblish v. Hiblish, 71 Ind. 27. Again the doctrine that a lunatic (or imbecile) or his estate is liable for

necessaries supplied to them can not be denied. 5 Lawson's R. & R., sec. 2390, and numerous cases cited. See, also, *Sawyer v. Leufflin*, 56 Me. 308; *Reano v. Mosplay*, 90 Me. 251; *Blarsdale v. Holmes*, 48 Vt. 492; *Richardson v. Strong*, 55 Am. St. 430; *Jackson v. King*, 15 Am. Dec. and notes on p. 368; *Ex parte Northington*, 79 Am. Dec. p. 67, and notes on p. 68; *Young v. Stephens*, 97 Am. Dec. 592. An express promise to pay must, however, be shown where the parties live together as members of the same family, or facts from which the same may be inferred. *In re Perry's Estate*, 25 N. Y. S. 716. Circumstances may be so varied that in some cases the implied promise may arise, while in others not.

Sec. 1661. Contract of service made by correspondence.

If you find from the evidence that previous to ——— that plaintiff and defendant had correspondence by mail, and that defendant, in a letter to and received by plaintiff, proposed to hire plaintiff to labor for him for a year at a stated price, and that plaintiff, in a letter written to and received by defendant, accepted said proposal without condition or reserve, then such a letter would constitute in law a written contract between plaintiff and defendant to labor for one year.

In construing the letters, the whole correspondence, promises and inducements held out should be considered, the subject-matter and the parties, and from the whole a reasonable conclusion be deduced; and where one party is old, able, adroit in the use of language and promises, and the other young and inexperienced in the use of language, and a minor, a court will not strain the rules of construction against such minor, and in favor of the older, experienced one, especially where such construction would result in gross injustice to the minor.¹

¹ *Easthope v. Fordyce*, Supreme Court, unreported, No. 2910. Affirmed.

Sec. 1662. Contracts, express or implied—Proof of.

Contracts are either express or implied. In general, the only difference between an express and an implied contract is the mode of proof. An express contract is proved by evidence of the express words used by the parties. An implied contract is established by proof of circumstances showing either that in

justice and honesty a contract ought to be implied, or that the parties intended a contract. Whether the contract be established by evidence, direct or circumstantial, the legal consequences must be the same.

Sec. 1663. Contract for services when implied.

The law usually implies that, where services are accepted or other valuable thing is received, the party accepting has agreed to pay for them. This, however, is a mere presumption that varies with the circumstances, and when services are rendered by one member of the family to another, this presumption does not hold, in which case the parties must resort to evidence to establish the presumption of an obligation to pay therefor; but this presumption is one that varies with the circumstances and is to be determined by the understanding either express or implied between the parties as developed by the evidence submitted to you. But the mere fact that plaintiff rendered such services to a sister in and of itself does not raise the presumption of an implied contract to pay. If you find by a preponderance of the evidence that no contract, either express or implied, was entered into between the decedent and plaintiff, this would end the case, and your verdict should be for the defendant.¹

¹ Voris, J., in *Fairbanks v. Otis*, Summit County Common Pleas.

Sec. 1664. When the relation is that of brother, or sister or parent and child, burden upon one claiming relation of contract of service to prove it, and to rebut presumption that it was gratuitous.

The rule is well settled that where the relation of parent and child, or brother and sister exists, the law will not presume any other, that is, the law will not presume that of debtor and creditor. In order to establish the inferior relation of debtor and creditor between a parent and child, or brother and sister, there must be proof more or less strong, but sufficient to carry conviction, that the parties understood the inferior relation, to-wit:

that the parties contracting to subsist between them at the time an agreement in reference to it is entered into.

If you should find that the decedent promised to pay the plaintiff for the services, you may presume that a contract was entered into to perform the services. To enable the plaintiff to recover, a preponderance of the evidence must show a promise to pay, or that the decedent expected to pay for the services, or that the decedent could not, in justice or good conscience, receive the same and not pay therefor what they were reasonably worth, and that the plaintiff expected to receive compensation for his services.

The jury is instructed that there must be evidence to rebut the presumption that what was done by the plaintiff for her sister was gratuitously given and received, so that if you find from the evidence that the services were gratuitously given, as an act of sisterly duty and affection merely, and no request and no promise to pay, or that the circumstances accounted for her conduct on grounds more probable than that of the promise of recompense, no presumption of a contract will be implied. But if you find that the circumstances were such as required extraordinary and continuous services of substantial value, the presumption that the services were gratuitously rendered to a sister would not necessarily obtain, and we leave it for you to say, under all the circumstances provided, whether the services and the items of the account rendered were intended to be gratuitously given. If gratuitous, you should find for the defendant: if not, you should find for the plaintiff.¹

¹Voris, J., in *Fairbanks v. Otis*, Summit County Common Pleas.

Sec. 1665. Service rendered by grandchild to grandparent.

1. *Request to perform service—Implied from circumstances.*
2. *Circumstances negating promise—Gratuitous services—Relation of child and parent.*
3. *Presumption that services by child for parent during sickness while living in same household is gratuitous.*

1. *Request to perform services—Implied from circumstances—General doctrine.* The plaintiff alleges in her petition that

these services were performed at A. S.'s request. Such request, gentlemen, need not be proven by direct and positive evidence; a request to perform services may be implied from facts and circumstances proved on the trial of a case. If a man accepts valuable services from another, and receives the benefit of them, the law implies a request upon the part of the person receiving such services for the other to perform the same. And in this case, gentlemen, you would be warranted in implying a request upon the part of A. S. for the plaintiff to perform the services that she did perform.

It is admitted here that the services were performed, and it is admitted they were of value, and from these facts the law will warrant you in implying a request upon the part of S. for the plaintiff, Mrs. C., to perform these services. But to go further, was there an implication? Does the law imply a promise from the facts and circumstances proved on the trial of this case on the part of S. to pay their reasonable value? Ordinarily where there is a request to perform valuable services, and when they are performed in pursuance of such request, the law will imply a promise upon the part of the person receiving the benefit of such services—a promise to pay their reasonable value—unless there has been something shown—some facts and circumstances shown—that negative any implied promise upon the part of the person receiving the services to pay their reasonable value.

2. *Circumstances negating promise—Gratuitous services—Relation of child and parent.* In this case it is claimed that there are circumstances surrounding the performance of these services that negative any implication upon the part of S. to pay for the same. It is claimed that the plaintiff here entered the family of A. S. when she was about eleven or twelve years of age; that she continued to reside in his family as a member of the same, performing the services claimed in the petition up to and including her twenty-fourth year. It is claimed that during the time she was in this family she was not only a member of it, but was treated as a member of the family, and that her boarding,

clothing, and lodging were furnished her by A. S. It is admitted that the plaintiff was the granddaughter of defendant's testate, A. S. It is claimed here by the defendant that these circumstances negative any implied promise upon the part of A. S. to pay for the same.

Services performed at the request of another, while they may be valuable, and while they may be beneficial to the person who receives them, may be performed under such circumstances as that the law will imply that they were gratuitously performed; that the law will imply that the party who performed them never intended to make any charge for the same, or never expected any compensation for the same.

3. *Presumption that services by child for parent during sickness while living in same household is gratuitous.* Where a person sustaining the relation of a child to a parent performs valuable services, and during the time of the performance of the same is a member of the family, receiving his board, his clothing, his lodging, and his nursing, if he became sick during that time, the law presumes that such services were gratuitously performed, and that there was no expectation upon the part of the person performing the same that the person for whom they were performed would pay him. The law presumes under such circumstances that such services were gratuitous, with no expectation of receiving any compensation therefor. To sustain the contention of the plaintiff in this case, the evidence must sustain the claim that the services were not rendered under the ordinary relation of parent to a child, or parent to a grandchild, or debtor to a creditor, or master and servant. You must look to all the evidence in determining the question. Was this girl a member of that family? Was she treated as a member of that family? Was she treated as the other daughter was treated? Was she provided for as the other daughter? Was she provided for as the daughter of a man in the circumstances of A. S.—in the circumstances in which he then was—usually provides for his daughter? Was what she needed and what was necessary for her condition and station in life provided for her by A. S. during the period she claims to have performed these services?

You are to determine this question from the evidence, and from the evidence alone. If you shall find from the evidence that she entered this family as a member of it, and was treated in all respects as a member of the family—as a daughter; if S. provided for her clothing, board, lodging, nursing, and medicine, if it was required, then in that case the law raises the presumption that these services were gratuitously performed.

But if, upon the other hand, you find in this case that she was not a member of the family; that she was not treated as a member of his family, and S. did not furnish her with what would be necessary, if a member of the family in that behalf, then, in that case, the law raises no presumption that these services were performed gratuitously. And if they were performed at the request of A. S., then, in that case, the law implies a promise upon the part of S. to pay their reasonable value. And even if you shall find that this plaintiff went into this family and resided there as a member of the same, being treated as such, and being provided with clothing, food, lodging, nursing, and medicine, and everything that was necessary, yet in this case you find that A. S. expressly promised to pay her a reasonable value for her services, then, in that case, she had a valid and subsisting claim at law against defendant's testate.¹

¹ John B. Driggs, Judge, in *W. N. Stilwell v. Cowans*, Belmont County, S. C. 3785. Settled while in Supreme Court. Affirmed by Circuit Court.

Sec. 1666. Contract for services between employee and corporation.

To entitle the plaintiff to recover, there must have been a contract between him and the defendant, through its agent, express or implied, for his services as flagman.

1. *Contract express or implied.* An express contract is proved by evidence of the express words of the parties, or authorized agents for the purpose. An implied contract is established by proof of circumstances showing that either in justice or honesty a contract ought to be implied, or that the parties intended to

contract, and whether the contract be established by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be the same.

The defendant being a corporation, only acts through its agents duly authorized. If the plaintiff performed the services of the flagman at the defendant's request, or with its knowledge and consent, and the latter voluntarily took the benefit of such labor, then the law presumes that he will be paid for his labor, unless the contrary is shown by the evidence. And if no special contract is proved, fixing the price, then he is entitled to have what his services are reasonably worth. And if you find these facts by a preponderance of the evidence under the rules given, your verdict should be for the plaintiff; otherwise for the defendant.

Sec. 1667. Action for services by wife against executor of deceased father-in-law.

1. *When parent resides with child, services by former presumed gratuitous.*
2. *Husband entitled to personal service of wife.*
3. *Contract must be shown to warrant recovery.*
4. *Whether services gratuitous.*
5. *Estoppel to claim compensation for services.*

1. *When parent resides with child, services by former presumed gratuitous.* Where a parent resides in the family of a child the presumption is that no payment is expected for services rendered by one to the other. This presumption is not conclusive, and may be overcome by proof of a contract to pay for such services. Such a contract may be proved by direct or indirect evidence, but in suits for compensation for services where a family relation is conceded or shown to exist, an actual contract must be proved as the basis of recovery therefor.

2. *Husband entitled to personal service of wife.* The husband is entitled to the personal services of the wife, and to any compensation owing for such services, unless she was doing business independent of her husband or with an understanding and an

agreement with him that she was to receive and have as her own the compensation for such services rendered.

3. *Contract must be shown to warrant recovery.* The plaintiff in this case can not recover unless she prove by a preponderance of the evidence that there was a contract upon her part to perform the services of nursing and caring for J. S. K. for compensation and upon his side to accept the services and pay her for them, and that the husband of the plaintiff consented thereto. If the plaintiff fails to prove to you by a preponderance of the evidence that such a contract was entered into between her and J. D. K. whereby he was to pay her for services or nursing and care, if any be rendered, and that her husband consented to the same, then defendants are entitled to your verdict.

If you find from the evidence that a contract was entered into between J. D. K. and plaintiff whereby plaintiff was to perform services of nursing and care for him, and upon his part he was to accept same and pay for them, and that plaintiff's husband consented thereto, and that in pursuance thereof the plaintiff rendered him services of nursing and care during the period claimed, then the plaintiff is entitled to recover the reasonable and fair value of such services unless you find that the defendants have proved the defense of settlement and payment for the services set forth and alleged in their second defense of their answer.

4. *Whether services gratuitous.* It is the claim of defendants that if plaintiff rendered any services whatever to J. D. K., she rendered them gratuitously and as a member of his family; and they further claim that on ———, said J. D. K. settled with and paid L. K. in full of all demands to that date, including any and all services that had been rendered to J. D. K. by way of care or nursing prior to said date, and that no services whatever were rendered to him thereafter by plaintiff or her husband.

There can be no recovery for services rendered voluntarily or gratuitously where a family relation exists in the absence of a contract that they were to be compensated. A family is defined as a collective body of persons who form one household under one head and one domestic government.

If you find from the evidence that plaintiff, her husband and J. D. K. lived together as a family and that the plaintiff nursed and cared for her father-in-law gratuitously, that there was no contract between plaintiff and J. D. K., that such services were not to be compensated, then plaintiff is not entitled to recover therefor, and your verdict in such case should be for defendants.

5. *Estoppel to claim compensation for services.* Where one person by his acts and with knowledge induces another to believe certain facts to exist and such other person rightfully acts on the belief so induced, and is misled thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon to the injury of the person so misled. Estoppel may arise from silence as well as words, but this is only where there is a duty to speak, and the party upon whom the duty rests has an opportunity to speak, and knowing the circumstances requiring him to speak, keeps silent.

If you find from the evidence that a contract was entered into between plaintiff and J. D. K. whereby he was to compensate her for her services of nursing and caring for him, and that this was with the knowledge of L. K., husband of plaintiff, and that she rendered such services during the period claimed for in the petition; and you further find that on ———, that J. D. K. was about to leave his son's residence and make his home elsewhere and stated that he wanted to pay all his bills that he owed there, and that in the presence of the plaintiff and her husband, he settled with and paid L. K., his son, for all care and nursing that had been rendered him up to that date, and that no services were rendered him by plaintiff after that date, and that plaintiff knew that J. D. K. was settling and paying in full for services rendered by her up to that date, and that so knowing kept silent and did not assert her claim, and that thereby J. D. K. was misled to believe that she assented thereto, under such circumstances, she will be held to have acquiesced or assented to such payment of her claim, and is not entitled to recover in this case,—and so finding, your verdict should be for the defendants.¹

¹ *Kinnaird v. Kinnaird & Wagner, Exrs., etc.* Court of Common Pleas, Franklin Co., O., Rathmell, J.

CHAPTER LXXXIX.

DAMAGES—IN PERSONAL INJURY.

(See DEATH BY WRONGFUL ACT.)

SEC.	SEC.
1668. Measure of damages in personal injury—Medical attendance.	physician as affecting damages.
1669. Same—A briefer form.	1672. Damages recoverable by husband for injury to wife.
1670. Damages for injury to minor in suit by next friend.	1673. Measure of damages where special defense made on account of physical condition of plaintiff.
1671. Duty of injured to care for himself—Employment of	

Sec. 1668. Measure of damages in personal injury—Medical attendance.

If you find that the plaintiff is entitled to recover, your verdict should be in his favor; and it should be in such an amount as will fully compensate him for the injuries which he has actually sustained, directly resulting from the negligence and want of care on the part of the defendant. This compensation would include the pain that he has already suffered, as well as the pain he will continue to suffer, if his injuries are of such a character as to cause him pain in the future. The time that he has actually lost by reason of his injuries, and the loss that may accrue to him by reason of his diminished capacity to earn money in the future, if you find his injuries are such as to diminish his capacity to earn money in the future.

In addition to this he would be entitled to recover, if you find in his favor, for expenses actually and necessarily incurred by him in this case by way of medical attendance and nursing, and which have been proven to have been thus expended; and you may also take into consideration any further expense which will

naturally and necessarily be incurred by him by reason of his injuries, if you find that his injuries are of such a character as to require such expenses and outlay upon his part.

You may also take into consideration the length of time that has elapsed from the time that the plaintiff received his injuries until the present, not as interest, nor by way of interest, but simply as a part of the compensation to which the plaintiff would be entitled in order to make him whole, if you find he is entitled to recover.¹

¹ From *P. & L. E. R. R. Co. v. Munich*, supreme court, unreported.

Sec. 1669. Same—Another briefer form.

If you find that the defendant is liable, you will award to the plaintiff such sum as damages as will fairly and justly compensate him for the injury; the measure of his damages is compensation and only compensation. You will take into consideration the nature of the injury, the extent of it, the pain which he has suffered, all the expenses which he has necessarily been put to in consequence of the injury. You will consider the effect of the injury, the permanency of it; the effect of the injury upon his bodily strength and upon his capacity to labor and earn a living, and all the circumstances, calmly and deliberately, and apply your judgment to the evidence in the case. If you find in favor of the plaintiff, as I have said, you will award him such damages as will fairly and justly compensate him for the injury.

Sec. 1670. Damages for injury to minor in suit by next friend.

But the father is entitled to the services and earnings of his minor son, until he becomes twenty-one years of age, and may bring an action in his own name against the defendant to recover such damages as he may have sustained in consequence of its alleged negligence; and therefore you can not allow the plaintiff (a next friend) any damages for any of his time that has been lost, or which may be lost in consequence of said injury before he reaches the age of twenty-one years.¹

¹ *Evans*, Judge, in *Cent. Nat. Gas & Fuel Co. v. Baker*.

Sec. 1671. Duty of injured person to care for himself—Employment of physician as affecting damages.

“If the plaintiff is entitled to recover any damages, he is entitled to recover an amount sufficient to compensate him for the injury which he has actually sustained, so far as the damages to him naturally and directly flowed from and were caused by his wounds, bruises, or other injuries caused by defendant’s acts of negligence complained of. After the plaintiff was injured he was bound to use ordinary care and prudence, under all the circumstances, to take care of himself and his wounds; and if he employed a physician of good standing and reputation, supposing and having reason to think he was such, and who, in fact, was such, then, though the physician may not have used all of the approved remedies, or that remedy which would have been most suitable in the case, or which a good medical man would have used under the circumstances, and on account of the failure to use such usual or proper remedies his condition is worse than it would be had it been used, still plaintiff may recover for his actual damages, if he himself has not been negligent, and such treatment or failure to use such remedy merely will not prevent plaintiff from recovering the full extent of his injuries as aforesaid.”¹

¹ From *Loeser v. Humphrey*, 41 O. S. 378.

Sec. 1672. Damages recoverable by husband for injury to wife.

You should not include any damages that resulted to the husband of the plaintiff for any injuries to the person of his wife, for her physical suffering, or her mental anguish, such as constitute a violation of her personal rights, for anything which she may have lost in her wages, or her ability to earn wages, or as a wage-earner for other persons, but not in the domestic services of the plaintiff in his family or household affairs, or to her own separate property or means. But for all these the law gives her a remedy in her own right, and for which the husband may not recover. But he may recover in this action for any damages he

may have sustained by reason of the impaired ability of his wife caused by said acts of negligence, if any you find from the evidence, to perform her usual domestic services in and about his family and household, for such services as she was able and usually contributed "to his pursuit of gardening in connection with her household duties, and in selling and marketing said products," taking into account the loss of time, the extent and probable duration of any impaired ability which you may find from the evidence, if any, for any loss of the society and comfort of his wife, and for any expenses reasonably incurred for surgical and medical attendance and nursing, incurred in his own behalf, or for his said wife, and for damages to the vehicles as you find the facts to be from the evidence.¹

¹ Voris, Judge, in *Cranmer v. Akron St. Ry. Co.*, Summit County Common Pleas. See *London v. Cunningham*, 20 N. Y. S. 882, 22 Am. St. Rep. 800.

Sec. 1673. Measure of damages where special defense on account of physical condition of plaintiff.

While it is no defense to say that the person was of susceptible nervous diathesis, or of infirm health, and liable to break down from nervous exhaustion or other causes, and not able to perform ordinary labor, yet these circumstances as you find them to be may be and should be considered by you in determining what compensation ought to be awarded, if any, by reason of future impaired ability to earn wages (or perform labor) or engage in any profitable employment, as bearing upon the question of the length of time the plaintiff may or may not continue to be disabled, and the probable duration of his (or her) life.

But for whatever impairment he (or she) has so sustained, or will sustain, and caused by said wrongful acts of the defendant, he (or she) is entitled to be compensated, so far as you can reasonably ascertain from the evidence. You may consider also what effect, if any, the fact that the plaintiff continued in her occupation after the injury had upon her physical condition. You are instructed that for any suffering or impairment caused

or sustained by reason thereof she can not recover, if by reasonable care and prudence under all the circumstances, and the surrounding circumstances should be considered by you in determining whether she exercised reasonable care and prudence, she would have avoided them. The defendant can not be charged with the consequences of the want of reasonable care and prudence of the plaintiff that caused her suffering or impairment that otherwise she would not have endured.

But you are instructed, however, that it is not sufficient to defeat her action that she thereby only aggravated the injury caused by the negligence of the defendant.¹

¹ Voris, Judge, in *Dussel v. Akron St. R. R. Co.*, Summit County Common Pleas. Affirmed by Circuit and Supreme Court.

As to damages for personal injury when the person's health is impaired at the time of injury, see 10 Am. St. Rep. 65.

Sec. 1673a. Same continued—Amount of compensation.

As to the amount of compensation, the court can give you no further assistance. The law has wisely left that to the intelligence, candor, and impartial judgment of twelve jurors. Neither should your prejudices or sympathies in the least affect that judgment. What does a fair consideration of the evidence say that impartial justice demands?

It is the pride of our jurisprudence that justice is administered impartially. The law loves candid justice, and is no respecter of persons. The rich and poor, the weak and influential, are alike entitled to its protection. You are the exponents of that sense of justice.¹

¹ Voris, Judge, in *Dussel v. Akron St. R. R. Co.*, Summit County Common Pleas. Affirmed by Circuit and Supreme Court.

CHAPTER XC.

DANGEROUS PREMISES.

SEC.

1674. Injury to one walking along sidewalk and privately paved part of premises connected therewith by falling into hole directly in front of cellar window. (See special subjects or headings in sectional heading in text.)

Sec. 1674. Injury to person walking along sidewalk and privately paved part of premises connected therewith by falling into hole directly in front of cellar window.

1. *Statement of pleadings and issues.*
2. *Burden of proof.*
3. *Credibility of witnesses.*
4. *The question for the jury.*
5. *Owner of premises bound to keep premises in safe condition for persons going thereon. Duty to traveler on sidewalk.*
6. *Defendant liable only if hole dangerous.*
7. *Duty as to verdict.*
8. *Duty of plaintiff.*
9. *Proximate cause.*

It is alleged and not disputed that the defendant was the owner at the time of this alleged injury, of the premises in question. It is alleged and not disputed that he had leased them to a woman by the name of D. M. for the purpose of conducting a millinery store or business on the property. It is alleged and not disputed that this D. M. had millinery displayed in the windows.

It is alleged and not disputed that prior to the date, ———, at the time of leasing the premises, that there was a cement pavement in front of the house about thirteen feet, ten inches wide, from the curbstone on High street to the front wall of the house;

that a portion of this pavement, about eight feet next up and parallel to the curb was city sidewalk, and the remainder was on the private property of the defendant.

Then it is alleged and not disputed that this pavement is continuous and on the same plane, extending from the curb back to the property of the defendant. It is alleged and not disputed that it extends back with the exception that there is a cement step at the entrance of the premises in which this open hole was. It is alleged and not disputed that there was a hole in the pavement in the form of a segment of a circle which was unguarded; that it was open and that it was directly in front of a cellar window, and that there was a window above with millinery displayed, and so on. It is alleged that the hole was about five feet back from the city sidewalk line; that it was twelve inches deep, about eleven inches wide at the widest point, and about three feet nine inches long from end to end along the line of the outer surface of the front wall, and that the hole was a part of the permanent improvement of the property.

The plaintiff alleges that there was nothing on the pavement to show the city sidewalk line, and alleges that the pavement was open for public use; that all of the said pavement was used by persons going to and from the house or viewing the millinery in the front window of the tenant, D. M.

Plaintiff then alleges the manner in which she received her injury.

The defendant enters a general denial of all the things that are not admitted, and the second defense is that said plaintiff wandered off of the city sidewalk in front of the defendant's premises without reason or excuse therefor, went upon the private property of the defendant and negligently stepped into the said opening in front of the cellar window; that the property of the defendant in front of the house was well lighted and that said opening could have been readily seen and observed by the plaintiff, who was thoroughly familiar with the defendant's premises and house, and knew, or in the exercise of ordinary care, should have known of the whereabouts and location of the opening, and

that the negligent conduct of the plaintiff was the proximate cause of any injury which she suffered and which is set forth in the amended petition.

2. *Burden of proof.* (The usual charge.)

3. *Credibility of witnesses.* (The usual charge.)

4. *The question for the jury—Dangerous character of hole.*

The question for the jury in this case is whether the hole as described and admitted in the pleadings was so located as to be dangerous to persons and to the plaintiff lawfully passing along and upon the pavement in front of the defendant's property while using ordinary care, and whether ordinary prudence required defendant to erect a barrier around or over the hole.

It is admitted that about eight feet of the sidewalk was city sidewalk while the remainder thereof was on the premises of the defendant; that the same was continuous and on the same plane, extending from the curb to the front wall of the house except for the front steps at the entrance to the house, and which extended out to the south of the hole; that the hole was about twelve inches deep and about eleven inches wide at the widest point, and about three feet nine inches long, which was part of the permanent improvements on the premises.

The question which the jury must determine is whether the open hole was of such nature and character, and located in such position with reference to the street and sidewalk and that part of the defendant's premises which were paved with cement like the city sidewalk and lying beyond the outer line of the cement steps to defendant's property that a person in the lawful and ordinary use of the same, and exercising ordinary care was or is in danger of falling into the hole; that is, if the traveling public and this plaintiff were unable to observe the technical division line between the city sidewalk and the defendant's premises, which were paved similar to the city sidewalk, constituted an apparent public sidewalk kept so by the defendant, and was so constructed as to induce and allure the public and the plaintiff to use it and to suppose it to be part of the public way, the people generally and the plaintiff lawfully used it, the jury may

infer that it constituted part of the public way, and the jury may infer therefrom an implied invitation or license to use such part of the defendant's premises as a public way.

5. *Owner of premises bound to keep premises in safe condition for persons going thereon—Duty to traveler on sidewalk.* The general rule of law is that an owner is bound, and the defendant was bound to keep his premises in a safe and suitable condition for those who go upon and pass over them using due care, if he has held out any invitation, express or implied, by which they have been led to enter thereon. Even if you should find that plaintiff passed with or without knowledge, beyond the technical line of the street, that fact will not alone enable you to determine the question whether she was in the exercise of a traveler's right, because a traveler's right on the street is not confined to simply passing along the street. The plaintiff had the right to lawfully use the public way, or any portion of defendant's premises that may have been used as a public way by the traveling public, whether it was on a paved portion of defendant's premises, or on the city sidewalk. If you find that the paved portion of defendant's premises were used by the public, you are instructed that the plaintiff would then have the right to use such public way which was either part of the street or that part of defendant's premises used by the public for an approach or entry to the building of defendant for a lawful purpose.

The jury will notice that I have distinctly spoken of that part of the defendant's premises which have been so improved by him in such way that you could not or may not imply a license to the public and to the plaintiff to use as a public way for travel. I have purposely refrained from reference to that portion of the premises where the hole is located because the question which is submitted to the jury is whether the hole in question, under all the circumstances in this case, was dangerous to persons lawfully using the street or public way; whether there was danger of persons falling into the same.

6. *Defendant liable only if hole dangerous.* The defendant can be held liable in this case, if responsible at all, only in case

the jury find that the hole was dangerous to persons lawfully using the public way and that he failed to perform some duty of protection from it if it was dangerous. The location of the hole, the proximity to the public way, the character of the use of the public way and the manner of its use, the probability that travelers would or would not be endangered there, and the particular and peculiar surroundings of the case make it one for the jury, which must take all these matters into consideration in determining whether it was or was not dangerous. Was there any danger there to plaintiff while she was exercising ordinary care in passing along the public way?

7. *When owner to erect barriers.* In the matter of the alleged dangerous character of the hole in question claimed by plaintiff, the jury is instructed that the defendant as owner of the premises was not obligated to erect and maintain barriers to protect travelers on or along the public way or street from an opening or hole such as is claimed to exist in this case, unless the hole is located so near the street or public way used by travelers as to be a place of danger, or is of such nature and character as to be a place of danger for those lawfully passing along the street or public way in the use of ordinary care. The true test in law of the obligation of the defendant to erect a barrier, if there is any, is not necessarily the distance from the sidewalk or public way of the hole in question, whether it be much or little, but it is, on the contrary, whether the plaintiff in passing along the street or public way, exercising ordinary care, would or would not be subjected to such imminent danger that it would reasonably require a barrier to make the place or premises reasonably safe. This, gentlemen, is the question for you to determine in this case. The jury will, by the application of the rules of law given you by the court, determine whether the hole in controversy was or was not dangerous; whether it should or should not be protected by a barrier to protect those lawfully using the public way from imminent danger, themselves using ordinary care.

8. *Duty as to verdict.* If you find that there was not such imminent danger to travelers as to require a barrier, that will

be an end of your consideration of the case and your verdict will in such event be for the defendant. But if you find that the hole was such a place of imminent danger as to reasonably require a barrier, then you will consider further whether the injury to plaintiff was caused by the neglect of defendant, or whether it was caused by the neglect of plaintiff herself, as alleged by the defendant in his answer, by negligently stepping into the said opening. Defendant claims that the opening could have been readily seen and observed by the plaintiff who, it is alleged, was thoroughly familiar with the defendant's premises and house and knew, or in the exercise of ordinary care, could have known of the location of the opening.

9. *Duty of plaintiff.* The plaintiff was bound to use ordinary care in the use of the sidewalk and public way. If you find that by the use of ordinary care she could or should under all the circumstances and conditions have known of the existence of the hole, and therefore could have avoided the injury to herself, she may not recover and your verdict in such event should be for the defendant.

10. *Proximate cause.* If both parties, defendant and plaintiff, were negligent, you will determine which was the proximate cause of the injury, the neglect of the defendant or the neglect of the plaintiff.

The proximate cause is the efficient cause, the act but for which the injury would not have occurred. If it was plaintiff's negligent conduct that directly caused the injury, she may, of course, not recover; but if it was directly caused by reason of the imminent danger of the hole and the failure to properly protect it, your verdict should be for the plaintiff. And in that event you will award her such compensation by way of damages as you in your judgment, deem proper under all the evidence. You may consider the nature of her injury, any pain or suffering that she may have endured.¹

¹ Walker v. Rader, Franklin Co. Com. Pl., Kinkead, J.

CHAPTER XCI.

DEATH BY WRONGFUL ACT.

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Sec. 1675. Action for death by homicide—Self-defense.

“It is to be observed that this case is to be tried in the same manner, and it is to be governed by the same principles of law, as if the deceased had not died of the injuries, and had commenced an action for the recovery of damages for these injuries, or in other words, that this action can be sustained under such state of facts only as would have entitled the deceased, had he

lived, to have maintained an action, and recover damages for the injury which caused his death.”

“If, for instance, the deceased had been wounded, and had not died of his wounds, and had brought an action against the defendant for damages, if it appeared that deceased made the first assault, and this defendant repelled it by force, employing no more force than was necessary to protect himself, the plaintiff (deceased) could not recover; but if the defendant went unnecessarily beyond this, and employed force entirely disproportionate to the attack, such as to show wantonness, malice, or revenge, he himself would become a wrongdoer and would be liable for injuries inflicted beyond what was reasonable and necessary.”¹

¹ *Darling v. Williams*, 35 O. S. 58. The case from which this is taken was not one of negligence, but of intentional killing. The defendant denied the charge, and alleged that all he did was done in self-defense. This allegation the plaintiff denies, and upon these issues the case was called to trial. There was no appearance that the defendant's liability arose from negligence. The injury was the outgrowth of a fight or affray. Had the deceased survived and brought an action for the injury, it would have been an action for assault and battery. In such action the law governing cases of negligence, would have been entirely inapplicable. *Darling v. Williams*, *supra*.

Sec. 1676. Same continued—What is excusable homicide.

It seems to be now well settled that to justify the taking of the life of an assailant in an attack, there must appear to the satisfaction of the jury, first, that the defendant, if assaulted without any wrong or cause on his part, honestly and truly believes that he is in imminent danger of his death, or of great bodily harm; and if, secondly, he has just and reasonable cause to apprehend such danger, which he can not avoid without taking the life of his adversary, it is excusable.¹

¹ *Darling v. Williams*, 35 O. S. 58.

Sec. 1677. Same continued—Right of self-defense—Justification.

That every person has the right to defend himself against attacks, or threatened attacks, of such character as would en-

danger his life or limb, or to do him great or serious bodily harm or injury, even to the taking of the life of the assailant; and where a person apprehends that another is about to do him great bodily harm, and has reasonable grounds for believing the danger imminent, he may safely act upon such apprehension and even kill the assailant, if that be necessary, to avoid the apprehended danger.

That the necessity which permits in law, the taking of life in self-defense, may be either apparent or real. It is real when there is actual danger to life, or great bodily harm; it is apparent, when the circumstances, at the time of taking life, to a reasonable mind, indicated the presence of actual danger to life, or great bodily harm, though there is in fact none.¹

“It is not, however, necessary that the danger should prove real or in fact existing, for whether real or apparent, if the circumstances are such as to induce a belief sufficiently well grounded, that life is in peril, or that grievous bodily harm is intended; and to be threatened with a danger, he may act upon appearances and slay his assailant. Yet there must be reasonable ground for his belief in the danger threatened, arising out of the circumstances in which he is placed, otherwise the act of taking the life of the assailant is entirely without justification.”²

¹ *Darling v. Williams*, 35 O. S. 58. “One person can justify the taking of the life of another in self-defense, only where, in the proper exercise of his faculties, he believes in good faith, and upon sufficient or reasonable grounds of belief, that he is in imminent danger of death, or grievous bodily harm.” *Id.*; *Marts v. State*, 20 O. S. 162.

² *Darling v. Williams*, 35 O. S. 62. Boynton, J.

Sec. 1678. Action for death by wrongful act—By administrator of wife, killed at steam railroad crossing, while riding with husband, who is driving team—Railroad crossing.

1. *Introducing statement.*

2. *Failure to provide gates, to give warning of approach of trains at crossings, and to keep watchman thereat—Ordinance.*

3. *Failure of driver and occupants of wagon to look and listen for approaching trains.*
4. *Administrator may recover if deceased not negligent.*
5. *Occupant of wagon having right to direct or control one whose negligence contributes to injury—Husband and wife.*
6. *If husband or wife saw or could have seen train.*
7. *Misled by absence of watchman.*
8. *Failure to ring bell or sound whistle.*
9. *Vision obstructed by buildings.*
10. *Contributory negligence of beneficiaries.*

1. *Introductory statement.* This action is brought by plaintiff as administrator of S. F., deceased, seeking to recover damages for pecuniary injury resulting from the death of S. F., deceased, for the benefit of the husband, J. F., and the children of said decedent (naming them).

The statutes conferring this right of action provide, in substance, that whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action against, and recover damages in respect thereof, then in such case the corporation or person so liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.

The statute also provides that every such action shall be brought in the name of the personal representative of the deceased person for the exclusive benefit of the husband and children, if there be such, of the person whose death shall be so caused, and in every such action, the jury may give such damages not exceeding in any case \$——, as they may think the proportion to the pecuniary injury resulting from such death, to the persons respectively for whose benefit such action shall be brought.

2. *Failure to provide gates, to give warning of approach of trains at crossing, and to keep watchman thereat—Ordinance.* It is for the jury to determine from the evidence whether the

defendant was negligent as claimed in failing to provide gates at the railroad crossing, and in failing to give warning of the approach of the train at the crossing, and in failing to maintain and keep a watchman at the crossing at the time and place of the injury, and also whether the defendant railway company violated the ordinances of the city in failing so to do.

If the jury find from the evidence that the city of Columbus by ordinance provided for the maintenance of gates at railway crossings with streets and highways of the city, and provided for the maintenance of watchmen at crossings of steam railways within the city, as well as for the ringing of bells and blowing of whistles to give warning to travelers approaching crossings to pass over the same, you are instructed that it is proper for you to consider the provisions of this ordinance with all the other evidence in the case in determining whether the defendant was guilty of negligence in one or more of the particulars mentioned and set forth in the petition.

The jury are instructed, however, that the disobedience of the provisions of the ordinance by the railroad company would not in and of itself constitute negligence on the part of the defendant company which alone would entitle plaintiff to recover in this action. The ordinance of the city is to be regarded merely as an expression by the law-making body of the city of a standard of duty required by it in respect to the conduct and management of railway trains under such circumstances. But as stated, this requirement is not necessarily controlling in your deliberations upon the question, it being entirely within your province and duty to determine the fact of negligence or not, according to the evidence as you see it, based entirely upon your own opinion and judgment upon all the evidence. A law of the state enacted by the legislature prescribing a duty under such circumstances, if there was such a law, would be binding upon the jury as prescribing the standard of duty, and a violation thereof would constitute *per se* negligence. But such is not the rule in respect to an ordinance. The jury are permitted to consider the provisions of this ordinance along with all the other testimony and determine the fact.

3. *Failure of driver and occupants of wagon to look and listen for approaching train.* The evidence in this case tends to show that S. A. F. was riding with her husband, J. F., at the time of the injury complained of, and that her husband was driving, S. A. F. being seated in the wagon, but that she was not driving the horses.

It was the duty of the driver of the wagon, as well as that of the occupants thereof, in approaching the railroad crossing known to them, to look and listen for approaching trains. Where the evidence shows that both the driver and the occupants of such a wagon fail and neglect to look and listen for approaching trains, the occupant of such wagon is guilty of negligence which will prevent a recovery of damages against the railroad company for injuries received at the crossing by a collision of the wagon with an approaching train. This is true notwithstanding the railroad company may have been guilty of negligence by running its train at an unlawful speed within the city limit, failing to blow the whistle or ring the bell as provided by ordinance, or failing to maintain a watchman or gates at the crossing of the railroad with the streets.

The law devolves a duty upon all persons approaching a known railroad crossing, to exercise ordinary care on their part to avoid coming in collision with the engine and cars at the crossing and to avoid injury therefrom. It is incumbent upon the jury, therefore, to look to the evidence and determine therefrom whether or not S. A. F. at the time and place exercised ordinary care on her part in approaching the crossing; and if you find that she did not exercise ordinary care, either by looking or listening for the approach of trains, or if she saw or heard the train approaching, and failed to notify her husband of such fact, if under the circumstances the jury find that she could by the exercise of ordinary care, have seen or observed the train in time to have stopped the team of horses before going upon the track, or in time to have notified her husband to stop the team before reaching the track, and that she failed to do so, then the jury are instructed that such neglect on her part will constitute negli-

gence which, if it was concurrent with and directly contributed to the injury causing her death, then plaintiff may not recover.

4. *Administrator may recover if deceased not guilty of negligence.* If, on the other hand, the jury find that S. A. F., the deceased, under all the circumstances was not guilty of negligence in approaching the crossing, that there was no failure on her part to exercise ordinary care in approaching the crossing, and that the defendant was guilty of negligence in any one or all of the particulars charged, and such negligence on its part was the proximate cause of the injury producing the death, then the plaintiff is entitled to recover provided you find that the persons named as beneficiaries in the petition have been damaged, notwithstanding you may find that the husband, J. F., was himself guilty of negligence which directly contributed to the injury which caused the death of the wife, S. A. F. That is, if the wife herself was in the exercise of ordinary care at the time of the approach to the railroad crossing by her husband while driving the vehicle, and if she was not guilty of negligence directly contributing to the injury producing her death, then the jury are instructed that the law of imputed negligence would not apply, even though the driver of the vehicle has the husband, unless you find that the husband as such driver was under the control and authority of S. A. F., the deceased wife, and that J. F., the husband, was thereby the agent of the wife.

5. *Occupant of wagon having right to direct or control one whose negligence contributes to injury—Husband and wife.* It is the law of this state that where an occupant of a wagon stands in the relation of a principal to, or has the right to direct or control the action of one whose negligence contributed to the injury of the occupant, then in that event, the law is that acts of negligence on the part of the one who stands in the relation of an agent, may be imputed to the occupant or principal, and the negligent acts of the agent, if the same caused or contributed to the injury, would be a bar to recovery for the injuries sustained by any such principal. So the jury is charged that it was the duty of both the husband and wife in approaching the crossing,

to exercise ordinary care under the circumstances, to look and listen for the approach of trains at the crossing before undertaking to cross thereover.

6. *If husband or wife saw or could have seen train.* You are instructed that if the wife and husband when about to cross over the railroad track at the crossing saw the train of cars approaching the crossing from the south, or if by the exercise of ordinary care they could have seen it, at the time and place, you are in that event instructed that if, by the exercise of ordinary care, they could have stopped the team of horses before entering upon the crossing, it was their duty to do so. In this connection the jury are instructed that when a train is approaching near a crossing of a street or highway, that drivers of teams approaching such crossing, are bound, in the exercise of ordinary care under the circumstances they are able to discover and learn of the approach of a train, to stop. Under such circumstances the train has the right of way because persons driving vehicles may stop within a few feet, while the train may not stop within the same distance that a team of horses can be stopped.

7. *Misled by absence of watchman.* It is claimed that the deceased wife was misled by the absence of a watchman at the crossing at the time of the accident. It is also claimed that the engineer of the locomotive either failed to sound the whistle or ring the bell of the engine while approaching the crossing, and that there were obstructions on the street at or near the vicinity of the crossing which prevented the deceased wife from seeing the approach of the train from the south toward the crossing.

8. *Failure to ring bell or sound whistle.* The jury are instructed that if the engineer of the locomotive did not ring the bell or sound the whistle while approaching the crossing, and that there was no watchman at the crossing at the time, and that the engine and cars were running at a rate of speed in excess of that provided by ordinance of the city, and that the deceased, S. A. F., in the exercise of ordinary care was misled by the absence of a watchman or of signals from the locomotive, and that the deceased, S. A. F., as a reasonably prudent person

believed that she could cross the tracks in safety, and that while attempting so to do, without negligence on her part, was struck and killed by the train, and that such death was caused solely by any one of the acts of negligence charged against the company which were a direct or proximate cause of the injury causing her death, then the plaintiff is entitled to recover in this action.

9. *Vision obstructed by buildings.* There is some evidence tending to show there were buildings on the south side of M. street near the crossing, and that there was a moving wagon to the south side of M. street, at or near the point just east of the crossing at or about the time of the accident in question.

The jury is instructed that any obstruction which obscures or cuts off the range of vision of approaching trains increased the duty of vigilance to avoid the danger, and persons about to pass over crossings, are also required, if the view is obstructed, to call into use their sense of hearing and to listen for approaching trains. In other words, in the exercise of ordinary care by persons approaching a known crossing, the question whether such persons did or did not exercise ordinary care, will depend upon the circumstances at or about the vicinity of such crossing at the time, and in determining the question of negligence and also the question of contributory negligence, you will take into consideration all the circumstances surrounding the case and surrounding the parties at the time of the injury in question.

If you find from the evidence that the view of S. A. F. was obstructed as she approached the defendant's track by the building on the south, or by the moving wagon, so that she could not see far up the track, then it was her duty to listen for an approaching train before going upon the track. And if she failed to do so without reasonable cause therefor, she was negligent, and if such negligence contributed to produce her death, her administrator may not recover in this case.

10. *Contributory negligence of beneficiaries.* The beneficiaries named in the petition are (J. F., the husband of decedent, and the three sons and daughter of the decedent).

The jury is instructed that if any one or all of the beneficiaries for whose benefit this action is brought are guilty of contributory

negligence which directly contributed to the injury which caused the death of the person complained of, such contributory negligence will defeat the right of any such beneficiary so guilty, to recover damages therefor. But it would not defeat the right of other beneficiaries, if such there are, of any such decedent if they have sustained damages by reason of the death by negligence of any such decedent. Therefore, the jury is charged that if under the instructions and the evidence you find in favor of the plaintiff, it will be your duty to look to the evidence and determine whether J. F., the husband of the decedent, was himself guilty of negligence directly contributing to the injury which caused the death of his wife. If you find that he was guilty of such proximate contributory negligence, then in your determination from the evidence as to the amount of damages that the beneficiaries are entitled to recover it will be your duty not to consider J. F., the husband of the decedent, as entitled to recover damages on account of the death of his wife.

If you find that the husband was not guilty of negligence contributing to the death of his wife, and that he has sustained pecuniary injury by reason of her death, then you may consider him as one of the beneficiaries entitled to recover in this action. And if you find that each and all of the beneficiaries named in the petition have sustained pecuniary injury, and you find for the plaintiff, it will be your duty to find and determine what damages respectively and beneficiaries have sustained.

The amount of damages should be a fair and just compensation for the pecuniary injury resulting to the husband and children from the death of the wife and mother. In no case can you consider the bereavement, mental anguish or pain suffered by the living for the dead. The damage is exclusively for the pecuniary loss; not a solace. It is the reasonable expectation of what the husband and children, if they, or either of them are entitled to recover, might have received from the deceased had she lived, which is the proper subject for the consideration of the jury, what the husband and children might reasonably expect to receive by reason of the services of S. A. F. in a pecuniary point

of view, is to be taken into consideration in determining the amount of damages. It is the present worth as a gross sum of money for the loss of the services of the wife that you are to consider. It is that sum which, put in money, as a compensation for what you find this woman would reasonably have saved for her family. In determining this, all these questions are to be considered; that is, the age, health, probability of length of life, if she had not died as a result of the injuries stated in the petition. In no event may there be a recovery for a sum in excess of \$10,000.00.¹

¹ Fippen, Admr., v. T. & O. C. Ry. Co., Evans, J., affirmed by circuit and supreme court, 86 O. S. 334.

Sec. 1679. Measure of damages for death of husband—Wife and children as beneficiaries.

The measure of damages in this action is the pecuniary injury only, the money value of the deceased to his wife and children. This is the law. The jury can not consider their bereavement, or the mental or bodily suffering of either deceased or his family. Nor can you allow anything by the way of exemplary damages. The sole question of the jury as to damages is what actual pecuniary loss the family of the deceased, named in the petition, has sustained by his death; and in coming to a conclusion on this matter, the jury may consider the habits of deceased at the time of his death, whether or not he was an industrious man, his physical condition, his capability of earning money, the manner in which he provided for his family, his expectancy of life, and such other circumstances presented by the evidence as will aid you in coming to a correct conclusion.

Sec. 1680. Another form as to measure of damages for death of husband.

Nothing can be recovered in this action by way of solace to this widow, who has been deprived of her husband, for sorrow or mental anguish which would result from that to her. It is purely a question for you, if you reach the question of damages, as to the pecuniary damage which has been sustained. And

should you reach that point in your deliberations, in fixing the amount of damage which has been sustained by the death of M., you may fairly take into consideration such facts as the evidence disclose as to M.'s age, his health, his habits of industry, and all those facts which bear upon the question as to what his life in dollars and cents was probably worth to his next of kin, and that sum would represent the damage that the plaintiff would be entitled to recover in this case, if you find that the negligence has been proven as alleged, and that such negligence caused the death of M.¹

¹ Wm. B. Sanders, Judge, in *L. S. & M. S. Ry. v. Matthews*, 51 O. S. 565.

Sec. 1681. Damages for death of young man, to mother, sisters and brother.

The damages must be in a sense speculative. You are to estimate what, by a fair judgment, would be a pecuniary compensation to the mother and sisters and brothers for the pecuniary loss which they have sustained by reason of the death of the plaintiff's intestate. It is the only pecuniary loss which they have sustained. You are to reach that by taking into consideration the age of the young man, his earning capacity, his probability of life, and to include in your verdict such amount as you think the mother, brothers and sisters would have received from this young man if he had continued to live, and had not been killed in the way in which it has been described to you. This calls for the exercise of a fair judgment and discretion. You may include in the verdict any reasonable probability of the accumulation of any money by this young man if he had lived, and the benefit from such accumulation, if he had died, to the persons for whose benefit this action is brought.¹

¹ Wm. H. Taft, Judge, in *C. H. & D. R. R. v. Kassen*, Supreme Court, No. 1545.

Sec. 1682. Intelligent discretion to be used in assessment of damages—Parents.

You will assess such damages in that case as in your judgment the plaintiff ought to recover, limited, however, by the instruc-

tions herein given. This discretion the court feels should be exercised in a reasonable manner. It must be an honest, intelligent discretion, guided by the facts that are given to you in evidence. This amount of damages, within the limits of the law, and which is fixed by the statute not to exceed ten thousand dollars, is to be ascertained from the evidence submitted to you. It should be a fair and just compensation, proportionate to the peculiar injury resulting to the father and mother from such death; and in determining this, the reasonable expectations of what the beneficiaries might have received from the deceased had she lived is the proper subject for your instruction;¹ but no damages can be given on account of bereavement, mental suffering, or as a solace on account of such death.² This compensation can be considered by you only as a hard cash transaction. In determining this compensation, the intelligence, health, and age of the deceased, or her capacity for services or wage-earning, and the reasonable expectation of what the father and mother might have received from the deceased had she lived, the age of the parents, and the reasonable expectancy of their lives, considering their ages, health, and uncertainty of human life, may be considered by you as shown by the evidence, which evidence must guide you.³

¹ *Grotenkemper v. Harris*, 25 O. S. 510.

² *Davis v. Guarnieri*, 45 O. S. 478-9.

³ *Voris, Judge, in Gaston v. Lake Shore R. R. Co., Lorain County Common Pleas.*

Sec. 1633. Damages resulting to husband and children for death of wife.

“The plaintiff’s damages, if any, should be a fair and just compensation for the pecuniary injury resulting to the husband and children from the death of the wife. In no case can the jury consider the bereavement, mental anguish, or pain suffered by the living for the dead. The damage is exclusively for a pecuniary loss, not a solace. The reasonable expectation of what the husband and children might have received from the deceased,

had she lived, is a proper subject for the consideration of the jury, if it finds for the plaintiff. What the husband and children might reasonably expect to receive by reason of the services of this woman in a pecuniary point of view is to be taken into account in determining the amount of damages, if you find for the plaintiff. It should be said that it is the present worth as a gross sum in money, for the loss of the services of the wife, that you are to find, if you find a loss. It is that sum which put in money is a compensation for what you find this woman would reasonably have saved for her family. Of course, in determining this, these things are all to be considered; that is, the age, health, probability of length of life, or death if she had not died from taking this drug.”¹

¹ From *Davis v. Guarnieri*, 45 O. S. 470.

Sec. 1684. Measure of damages for death of child—Mental pain and anguish not elements.

If you find for the plaintiff, in assessing damages you are not to consider the mental pain and anguish of the parents on account of this misfortune. This is, as the law provides, only a matter of dollars and cents, and you should allow a just compensation for the pecuniary injury resulting to the parents, and in getting at this, you will as best you can get at what is the reasonable expectation of pecuniary advantage to them from the life of this boy if he had lived, and it is for you to consider all his characteristics, and how long he might have otherwise lived, or how soon have died, and all the circumstances that throw any light on this part of the controversy. If you find for the defendant you will simply say so.¹

¹ Heisley, J., in *Spink* case, Cuyahoga County.

Sec. 1685. Measure of damages—Earning capacity.

In determining the amount of damages, if any, in a case like this, with reference to the earning capacity of the deceased, the jury is instructed that the true basis for recovery for the death of ——— if what you may find that the decedent would probably have contributed to his family, either for their sup-

port or as an addition to his estate. The measure of damages for the loss of human life, from negligence, so far as future earnings and contributions go to constitute damages is the present value of the contributions made by the deceased to the beneficiaries, ascertained by deducting the cost of his living and expenditures from the net income, and no more can be allowed than the present worth of accumulations arising from such net income, based upon the expectancy of life. That is, having ascertained the total sum, its payment must be anticipated, and no more than the present worth thereof can be awarded in damages. The discount should be made only from the time it is found that such contributions would have been actually made had decedent lived, and not at the end of the decedent's expectancy.¹

¹ *Evans v. Railroad*, 37 Utah, 431, 108 Pac. 638, Ann. Cas. 1912 C. 259.
(Made to fit ruling in this case.)

CHAPTER XCII.

DEEDS.

SEC.	SEC.
1686. Execution of, under duress— Threats.	1688. Covenant against encum- brances—What consti- tutes breach—Damages recoverable.
1687. Capacity to make—Weak mind—Old age—Decla- rations of grantor ad- mitted for what purpose.	1689. Mental capacity of grantor.

Sec. 1686. Execution of, under duress—Threats.

“To constitute duress which would avoid the deed, it is not necessary that the threats be of legal injury alone; but if the plaintiff, the wife of T., was induced to execute the deed by the threats of her husband, that he would separate from her as her husband and not support her, it is duress and will avoid the deed.

“The threats must be such as she might reasonably apprehend would be carried into execution, and the act must have been induced by the threats. It is not necessary that the threats be made at the time or immediately before signing, if it was within such time, and the circumstances prove that the threats or their influence properly conduced to influence the plaintiff.”¹

¹ Tapley v. Tapley, 10 Minn. 458; citing 2 Greenlf. Ev., sec. 308; 1 Story Eq. Jur., sec. 239.

Sec. 1687. Capacity to make—Weak mind—Old age—Declarations of grantor admitted for what purpose.

The court says to you that no general rule can be laid down as to what constitutes undue influence in this class of cases further than this: that in order to make a good deed the man must be a free agent and feel at liberty to carry out his own wishes and desires; and any restraints, threats or intimidations brought to bear upon the grantor, which he has not the strength of mind or will to resist if exercised so as to coerce him against

his desire and purpose in the making of the deed, is undue influence within the meaning of the law. And the amount of undue influence which would be sufficient to invalidate a deed may vary with the strength or weakness of the mind of the vendor; and the influence which would subdue and control a mind and will naturally weak, or one which had become impaired by age, disease or other cause, might have no effect to overcome a mind naturally strong and unimpaired. And whether such undue influence existed in this case must be determined by the jury from the consideration of the evidence. * * *

Evidence of the declarations of the vendor at times other than the time the deed was made, and instances occurring at times other than the said time, are competent as tending to show the kind of a person he was, and also to show the state of his mind, its strength or weakness, its susceptibility to influence or its capacity; and these declarations are admitted simply as to the external manifestations of the vendor's mental condition and not as evidence of the truth of the facts he states.¹

¹ Gillmer, J., in *Norris v. Western Reserve Seminary*, Trumbull Co. Com. Pleas.

Sec. 1688. Covenant against encumbrances—What constitutes breach—Damages recoverable.

As a matter of law, if you find the deed was duly executed and that there was the outstanding mortgage unsatisfied at the time of the execution thereof, that, even if nothing had been done beyond that, would constitute a breach of the covenant against encumbrances which would entitle the plaintiff to recover nominal damages only. But if the person, if M., the grantee in the deed, was obliged to pay anything beyond that, or anything for the purpose of removing the encumbrances, then, to that extent, or whatever he may have paid, he would be entitled to recover in this case.

If the encumbrance existed at the time of the execution of the deed, the breach of the covenant occurred at the time the

deed was executed, and the grantee would be entitled to recover for whatever amount was outstanding and a lien against the property at that time, with interest upon it from that time up to the first day of this term, provided he was obliged to pay it, or if it was paid out of the proceeds of his land on which that was found to be a lien, no matter whether that proceeding was instituted by the party holding the lien or somebody else; or if you find in this case that proceedings were instituted and money was paid, and that amount is all that was in dispute, it is necessary that you, by the testimony, should find the amount the party was obliged to pay, or what was paid on this outstanding claim out of the proceeds of the land of M.; to that amount he would be entitled, with interest upon it up to the first day of this term.

If you find he sustained any other damage in consequence of this outstanding lien, if you find he was damaged in other ways, directly, and there is direct and positive proof upon the subject that he was otherwise damaged, then you may take into consideration other damage, if any, which he may have sustained and which are clearly shown by the proof in this case. But if not, you should return a verdict, if you find this was not so paid, then you should return a verdict for the defendant; but if you find it was paid out of this fund, you should return a verdict for the plaintiff, and your verdict should be for the amount which was found by the court at the time the proceedings were had to foreclose this mortgage, and which was found by this court to be a lien on this property. If that amount was paid, he would be entitled to recover at your hands that amount with interest upon it to the first day of this term, from the time of such payment.¹

¹ *Marlow v. Thomas*, Supreme Court, unreported, No. 1918. By Johnston, J., in *Mahoning Co. C. P.* A covenant against an incumbrance is broken as soon as an incumbrance in fact exists, at least for nominal damages. *Hall v. Plaine*, 14 O. S. 417; *Rawle on Cov.* (5th ed.) sec. 70 and cases cited. An action for nominal damages may be maintained even without eviction. *Stambaugh v. Smith*, 23 O. S. 584.

The measure of damages for a breach of a covenant against incumbrances is the amount which would be required to be paid to extinguish the incumbrance, also any consequential damages directly resulting from the existence of the incumbrance. Wood's *Mayne on Damages*, secs. 259 and 260; *Delaverger v. Norris*, 7 Johns. 358; *Hall v. Dean*; 13 Johns. 105, 2 Wheat. (U. S.) 45; *Rawle on Cov. of Title*, sec. 86.

Sec. 1689. Mental capacity of grantor.

The law presumes that J. N., the grantor, had sufficient capacity to make such a deed, and therefore the burden is upon the plaintiff to show by a preponderance of the evidence, before he can recover, that J. N., the grantor, had not sufficient mental capacity to make the deed or instrument in question.

Before a man can legally convey his property, he must have memory. A man in whom this faculty is totally extinguished can not be said to possess understanding to any degree whatever, or to any purpose, but his memory may be imperfect, it may be greatly impaired by age or disease, he may not be able at all times to recognize the names of persons or families of those with whom he has been intimately acquainted; and he may at times ask and repeat questions that have been answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life, including the disposal of his property.

The question is not so much what was the degree of memory possessed by the grantor, as it is this: Did he have the requisite mental capacity, and was he a free agent in making the conveyance at the time he is said to have executed it?

1. *Old age alone.* The power to make a valid deed is not destroyed or lost by old age alone; nor is it denied to him who has attained the utmost verge of life. Old age does not always or necessarily extinguish the light of intellect. It is in some men more brilliant that it is in others at much earlier age. The law looks only to the competency of the understanding; neither age nor sickness, nor extreme distress or debility of body will be sufficient to render a deed invalid, provided the grantor at the time

it was executed did know what was being done, and did understand the nature of the act, and did have sufficient mental capacity to execute the deed; but the age of the individual, if considerable, is of importance and should be carefully considered by you as bearing on this question.

2. *Inability to recognize acquaintances.* An habitual inability to recognize neighbors and acquaintances would be strong evidence of a sunken intellect and should be carefully considered by you; but a few occasional instances of this kind may show in an old gentleman a memory weakened but not destroyed, impaired but not extinguished. The want of recollection of names is one of the earliest symptoms of decay of memory, but its failure may exist to a very great degree and yet the solid power of understanding remain. * * *

3. *Opinions of witnesses.* The mere opinions of witnesses are entitled to little or no weight unless they are supported by good reasons founded on facts which warrant them in the opinion of the jury. If the reasons are frivolous or inconclusive, or if founded on a wrong basis, the opinions of such witnesses are of but little aid to the triers of the cause. Every man having sufficient mental capacity, and not under any undue influence, is the lawful disposer of his own property, and he has the right to dispose of it as may seem best to him.

CHAPTER XCIII.

DRUGGIST.

SEC.

1690. Ordinary degree of skill required.

Sec. 1690. Ordinary degree of skill required.

The jury is instructed that a druggist or registered apothecary, or any person who undertakes to act in the capacity of a qualified druggist in preparing medicines and filling physicians' prescriptions, is required by law, to possess a reasonable and ordinary degree of knowledge and skill with respect to the pharmaceutical duties which he professes to be competent to perform. He is not required to possess the highest degree of knowledge and skill to which the art and science may have attained. He is not required to have skill and experience equal to the most eminent in his profession. He is only required to have that reasonable degree of learning and skill which is ordinarily possessed by other druggists in good standing as to qualifications in similar communities.

The law imposes upon a druggist the obligation to exercise all reasonable and ordinary care and prudence in applying his knowledge and skill in compounding medicines, filling prescriptions and performing all other duties of an apothecary. He is not bound to use extraordinary care and prudence, or a greater degree of care than is ordinarily exercised by other qualified druggists. Ordinary skill is the test of qualification and ordinary care is the test of the application of it. In applying his knowledge and exercising care and diligence, the druggist is bound to give his patrons the benefit of his best judgment. For in pharmacy there is a class of cases in which judgment and discretion must be exercised. The druggist is not necessarily responsible for an error of judgment which is reconcilable and

consistent with the exercise of ordinary care and skill. He does not absolutely guarantee that no error shall ever be committed in the discharge of his duties. He may commit an error or mistake which may not be held to be actionable provided he exercises ordinary care and judgment.¹

¹ Tremblay v. Kimball, 107 Me. 53, 77 Atl. 405; Am. Ann. Cas., 1912 C. 1215.

CHAPTER XCIV.

DYNAMITE—UNLAWFUL USE OR POSSESSION OF.

SEC.

1691. Having possession of dynamite for unlawful use—
Unlawfully depositing same.

1. The statute.
2. The charge and elements of crime.

3. Intent to make unlawful use of.

4. Malice and intent.

5. Alibi.

6. Defendant under influence of cocaine.

7. Opinion evidence as to mental capacity.

Sec. 1691. Having possession of dynamite for unlawful use— Unlawfully depositing same.

1. *The statute.*
2. *Charge and elements of crime.*
3. *Intent to make unlawful use of.*
4. *Malice and intent.*
5. *Alibi.*
6. *Defendant under influence of cocaine.*
7. *Opinion evidence as to mental capacity.*

1. *The statute.* The statutes of this state declare, in substance, that: "Whoever has in his possession or under his control dynamite or other nitro explosive compound for other than a lawful use, or places or deposits it upon or about the premises of another without his consent, shall be punished," etc. [Code, sec. 12533.]

2. *The charge and elements of crime.* Coming now to the charges in the indictment in the first count, the defendant is charged with having dynamite in his possession and control for other than a lawful use, to-wit, for the unlawful use of maliciously destroying the property of said Railway Company, known as the South Street Car Barn of said Company. In the second count the defendant is charged with unlawfully placing and depositing dynamite upon certain premises of said Street Railway & Light Company, known as the South Car Barns of said Company, without its consent. Before the defendant can be

convicted on either of the counts charged in the indictment, there are certain material facts which it is essential for the state to establish beyond a reasonable doubt.

Regarding the first count, the material facts are these: First. That the crime charged in said count was committed by the defendant in Franklin County, Ohio, on or about the time charged in the indictment. The exact time, gentlemen, is not essential, so that it is about the time charged in the indictment. Second. That the defendant had dynamite in his possession or under his control. Third. That the dynamite so in his possession or under his control was for other than a lawful use. Fourth. That the unlawful use was that of maliciously destroying the property of the Columbus Railway & Light Company, a corporation. Fifth. That such property was the South Street Car Barns and belonged to said Columbus Railway & Light Company, as alleged. Regarding the second count, the material facts are these: First. That the crime charged in that count was committed within the body of Franklin County, Ohio, by the defendant about the time charged. Second. The placing or depositing of the dynamite by the defendant on the premises belonging to the Columbus Railway & Light Company, a corporation, to-wit, its South Street Car Barns, as alleged. Third. So placing or depositing said dynamite without the consent of the said company.

Under these two counts in the indictment you may, if the evidence justifies it, find the defendant guilty upon both counts, or, if the evidence justifies it, find the defendant guilty upon either one of the two counts, and not guilty upon the other, or you may find the defendant not guilty upon either count. It is not essential to a verdict of guilty on either count that the dynamite should have exploded or injured any of the property of the Railway & Light Company. It is, however, essential, so far as the first count is concerned, that the defendant had it in his possession or under his control for the unlawful use as alleged; and, so far as the second count is concerned, that he placed or deposited it on the premises of the Street Railway Company without its consent, as alleged.

3. *Intent to make unlawful use of.* To constitute the offense, as charged in the first count, of having said dynamite in defendant's possession for the unlawful use as alleged, it is essential that he should have had the same in his possession, with the criminal or evil intent of making the unlawful use of it as charged. If you find that he had the dynamite in his possession, but not with the criminal intent of unlawfully using it to maliciously destroy the barn of said company as charged, he is not guilty. But if he had the dynamite in his possession with the evil intent of using it for the malicious destruction of said barn, as charged, and the other material elements constituting said crime are proved, you will be warranted in finding him guilty as charged in the first count.

If the defendant had dynamite in his possession or under his control, purchased by him at the request of and for other persons whom he did not know, and if, while he had such dynamite in his possession or under his control, he was entirely innocent of the fact that such dynamite was to be used for an unlawful purpose by such other persons, defendant is not guilty of having the dynamite in his possession or under his control for the unlawful use charged in the first count, although the persons for whom defendant bought such dynamite may have used it for such unlawful purpose. Whether or not, however, the defendant was innocent of the use to which said dynamite was to be or was put are matters for you to determine under all the facts and circumstances of the case. Furthermore, to constitute the offense, as charged in the second count, of placing dynamite upon the company's premises, without its consent, it is essential that defendant should have placed it there, as alleged, having the criminal or evil intent of doing so. If he had no such intent, he is not guilty. But if he had such intent and the other elements constituting the offense are proved, you will be warranted in finding defendant guilty on the second count.

4. *Malice and intent.* In order to show the possession of said dynamite by defendant for maliciously destroying the railway company's street car barn, as alleged, in the first count, it is not necessary to show motives of personal malice or ill will by de-

fendant towards said company; but to show a wanton and willful disposition by defendant to injure the said railway company in the manner alleged without justification or excuse is all that is required.

Malice and intent are operations of the mind, and are not usually proved by direct or positive evidence. In determining whether, if at all, there was malice, and whether there was a criminal intent on the part of the defendant in doing the acts charged in the indictment, if he committed such acts, or any of them, you will take into consideration all the facts and circumstances attending the alleged transaction, including the declarations, if any, of the defendant, and all of the facts and circumstances in the case.

5. *Alibi.* One of the defenses introduced by the defendant is what is known in law as an alibi; that is, that the defendant was at another place at the time of the commission of the crime charged in the indictment. The court instructs you that such a defense is as proper and as legitimate, if proved, as any other; and all evidence bearing on that point should be carefully considered by the jury. If, in view of all the evidence the jury have any reasonable doubt as to whether the defendant was in some other place when said crime charged in the indictment was committed, you should give the defendant the benefit of the doubt and find him not guilty.

The court instructs you further that the defendant need not prove such alibi by a preponderance of the evidence; neither does he need to establish it beyond a reasonable doubt; but if the evidence, as introduced, creates in your mind a reasonable doubt as to the defendant's guilt, then your verdict should be not guilty, even though you should not be able to find that the alibi was fully proved.

You will, therefore, look at all the evidence in the case and determine whether or not the accused might have been at the place he claims at the time shown, and yet might have committed the alleged crimes, or either of them charged in said indictment, and determine whether such evidence of alibi along with all the other evidence in the case, raises a reasonable doubt in your mind

of the defendant's guilt. If it does not, the defense of alibi is not made out. If it does, the defendant is entitled to an acquittal.

6. *Defendant under influence of cocaine.* It is claimed on the part of the defendant that at the time the crime charged in the indictment are alleged to have been committed, the defendant was under the influence of a drug known as cocaine, and that he was on this account, and by reason of his mental infirmities produced by disease, legally irresponsible for the acts or either of them. The court instructs you that every individual of mature years, charged with the commission of a crime, is presumed to be sane and to be responsible for the consequences of his own voluntary acts. The burden of proving that the defendant was not in a legal sense sane and responsible for his acts, is upon the defendant, and must be proved, to make it available as a defense, by a preponderance of the evidence. However, no man should be convicted and punished for crime unless he is a responsible moral agent. In order to constitute a crime, a man must have intelligence or capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will—no conscience or controlling mental power—or if through the overwhelming violence of mental disease, his intellectual power is obliterated, he is not a responsible moral agent, and is not punishable for criminal acts. Mere mental weakness, however, does not exempt one from responsibility for crime, when there is sufficient capacity to know that the act is wrong, and to abstain from its commission, although to exempt one from such responsibility it is not necessary that he shall have been totally deprived of his reason.

Furthermore, the court instructs you that under our law the voluntary use of cocaine whereby one comes under its influence, is no excuse for the commission of a crime, short of actual insanity or loss of reason. One otherwise responsible for crime is not exempt from such responsibility by reason of his addiction to the use of cocaine at the time of its commission, unless the drug has produced disease which has so far perverted or de-

stroyed the mental faculties as to render the person so afflicted, incapable, by reason of such disease, of knowing the nature and consequences of the act, and of distinguishing between right and wrong in its commission, or so far destroyed his will power as to be able to refrain from doing the act, if he had chosen to do so.

Applying this rule, if you determine that the defendant committed the alleged acts charged in either or both of said counts, you will inquire whether or not he was at the time addicted to the cocaine habit and under its influence. If you determine that the defendant was not addicted to the habit, or under its influence, you need not consider this feature further. But if you find that he was addicted to such habit, you will then inquire whether or not the drug itself, or it along with other mental infirmities, had produced a disease which so far perverted or destroyed his mental faculties as to render him incapable by reason of such disease or disordered condition, of knowing the nature and consequences of the act, or acts, and of distinguishing between right and wrong in their commission. If the drug itself, or it along with other mental infirmities, had not so affected him, you need not consider this feature further. But if the drug itself, or it along with other mental infirmities, had so affected him, he is not guilty.

7. *Opinion evidence as to mental capacity.* On the question of the defendant's legal responsibility and of the use and effect of cocaine, opinion evidence has been offered, and on these questions persons of experience in the medical profession have been called, to whom questions embodying certain statements of facts in the case have been put, and upon which statements of facts the experts have given their opinions. This is proper testimony for you to consider in determining the guilt or innocence of the accused. However, if the statements of facts as you find them to have been established by the testimony substantially differ from the statements of fact as propounded by the experts and upon which they base their opinions, then the opinions are not entitled to any weight in determining the questions involved in such statements. But if the questions to the experts embody the facts as you find them to exist from the

testimony, then you should give them such weight as in your judgment, in the light of all the testimony, they would be entitled to.

As heretofore stated, the burden of establishing the defense of legal irresponsibility, and by reason of the use of cocaine and mental infirmities of the defendant, is upon the defendant, and, to entitle him to an acquittal upon this ground, this defense must be established by a preponderance, that is to say, the greater weight of the evidence. However, if upon the whole testimony, including the evidence relating to legal irresponsibility by reason of the use of cocaine, and mental infirmities of the defendant, and the evidence relating to the defense of alibi, you have a reasonable doubt as to the defendant's guilt either upon the first or second counts of said accident, it will be your duty to acquit the defendant upon such count or counts as you may have such doubt.

Gentlemen, I need not call your attention to the fact that you are not concerned with regard to the strike, or any of its incidents, or with the question of who was right or who was wrong in that controversy. The matter you have to determine is between the State of Ohio and this defendant. Is he guilty or not guilty of one or both of the counts charged in this indictment?

If you find that the defendant, in this county, on or about the —— day of ——, 19——, had dynamite in his possession or under his control for the unlawful use and with the intent as alleged in the indictment, to-wit, the unlawful use of maliciously destroying the South Street Car Barns belonging to the said Columbus Railway & Light Company, as charged, it will be your duty to find the defendant guilty upon the first count. But if it is not proved, either that the crime as charged was committed in this county, or that the defendant had the dynamite in his possession or under his control, as charged; or that the defendant had it for the unlawful use, as charged, it will be your duty to find the defendant not guilty.

Regarding the second count, the court instructs you that if you find that on or about the —— day of ——, 19——, the defendant placed or deposited dynamite, as charged, on the premises,

to-wit, on the South Street Car Barns of the said Street Railway Company without its consent, as alleged, that he did it unlawfully and purposely, it will be your duty to find him guilty on the second count. But if you find that it is not proved either that the crime was committed in this county, or that the dynamite was placed on the premises of said railway company, as charged; or, that it was done without the consent of the company, it will be your duty to find him not guilty.¹

¹ State v. Strader, Franklin County Com. Pl., Rogers, J.

CHAPTER XCV.

EJECTMENT—ADVERSE POSSESSION.

SEC.

1692. What constitutes adverse possession.

1693. It need not be held under color of title.

1694. Meaning of continuous possession.

1695. Adverse possession—Occupation must be of some well-defined limits.

SEC.

1696. Lines between owners.

1697. Abandonment—What constitutes.

1698. Adverse possession may extend to what.

1699. Mistake in boundary line—Nature of occupancy.

1699a. Declarations as to ownership.

Sec. 1692. What constitutes adverse possession.

The period of prescription in Ohio, by which one acquires an easement or title in land, is twenty-one years. This is called adverse possession, and what constitutes adverse possession is a question of fact for the jury to decide under proper instructions by the court.¹

It is not necessary to constitute adverse possession, that a person shall merely be in possession for a period of twenty-one years, but there are certain requisites that must accompany that possession, which will now be explained to you. The fact of possession *per se*, is only an introductory fact to a link in the chain of title by possession, and will not simply of itself, however long continued, bar the right of entry of him who was seized, and, of course, creates no positive title in any case. The reason of this is, that it may have been possession with permission; and if the person in possession has offered to purchase the title of another claimant, it will not be adverse. To have the effect of creating title by adverse possession, the possession must not only have been actual, exclusive, open, and notorious, *with claim of title*, but it must also have been adverse during the whole period

of twenty-one years. It is not necessary, however, that the party should live on the land, but only so he exercises absolute control over it. To constitute adverse possession, there must have been an intention on the part of the person in possession to claim title, or he must have claimed it as against others, by declarations or acts, that a failure of the owner to prosecute within the time limited, raises a presumption of an extinguishment or a surrender of his claim.²

¹ *Tootle v. Clifton*, 22 O. S. 252, 253.

² *Lane v. Kennedy*, 13 O. S. 46, 47; *Humphries v. Huffman*, 33 O. S. 395.

Sec. 1693. It need not be held under color of title.

It is not an essential of the title acquired by adverse possession, that the party should have entered under color of title, nor that the possession be held under color of title. Where there is possession of the requisite character, the question, whether there is color of title or not, is wholly immaterial.¹

It is visible and adverse possession, with an intent to possess, that constitutes its adverse character, and not the remote motives or purposes of the occupant.²

¹ *Lessee of Paine v. Skinner*, 8 O. 167; *Yetzer v. Thoman*, 17 O. S. 130; *McNeeley v. Langan*, 22 O. S. 37.

² *French v. Pearce*, 8 Conn. 439; *Humphries v. Huffman*, 33 O. S. 402.

Sec. 1694. Meaning of continuous possession.

In order that it will constitute continuous possession, you are instructed that it is not essential that it shall be continuously held and possessed by one person. That is, the possession will descend to the heir of the possessor, without interrupting the running of the statute. It is sufficient that the possession during such period was in the party claiming or those under whom he claims; and, as to third persons against whom the possession was held adversely, it is immaterial, if successive transfers of the possession were in fact made, whether such transfers were by will, by deed, or by agreement, either written or verbal.¹

¹ *McNeeley v. Langan*, 22 O. S. 32.

Sec. 1695. Adverse possession—Occupation must be of some well-defined limits.

Now I say to you on that point that the law provides that when there is continuous, uninterrupted, open, notorious, and adverse possession of land by a person for twenty-one years or more, such person has a right to the possession thereof; it operates to convey a complete title as much as any written conveyance, and extinguishes the right of possession to any other, although holding the paper title. By these terms, continued, uninterrupted, is meant, it must not have been abandoned or lost during the twenty-one years; by adverse is meant a possession in opposition to the legal title and real owner, and the occupation must be by some well-defined, certain limits, indicated by a substantial and real inclosure or something of a like notorious character. It must be such as leaves no doubt as to what is included and as to what is intended as the limits. The kind of possession described is what defendant must show by a preponderance of testimony; that he or those from whom he derives title had had for twenty-one years or more; if he has done this, he is entitled to a verdict at your hands.¹

¹ Noble, J., in *France v. Dexheimer*, Sup. Ct., unreported, Cuyahoga Co.

Sec. 1696. Lines between owners.

Although the line between these two lots may by mutual mistake be laid different from the lot line, each being bounded by the lot-line in their deeds, if they or those from whom they claim title respectively occupied up to and acquiesced in the wrong line for a period of twenty-one years or more, the possession of each being open, notorious, continued, and exclusive, that line will be the true line between them.

The issue to be determined by you between the parties is, in the first place, where is the lot-line between these parties, and the burden of proof is upon the plaintiff to prove by a preponderance of testimony that it is where she claims it is, and she must establish her right to it independently of any weakness of the defendant's title. She must sustain her right to

the strip of land by testimony which places it in her independent of anyone else.

It is for you to say, gentlemen of the jury, under all the testimony of the case, who is entitled to this strip of land under the rule of law I have given you, what is the true lot-line. If the plaintiff is right as to its location, what is the fact as to another line being established and acquiesced in by the parties and those from whom they claim title, what do the neighbors who have been acquainted with it twenty-one years tell you about the original location of the fence spoken of and as to its remaining in the same position substantially ever since? What light does the testimony as to the position of trees and surveyor's marks and monuments throw upon it? Do they indicate it has remained as it was or that it has been changed from time to time and the line altered in some parts? All the testimony should have its proper weight with you in reaching a conclusion.¹

¹ Noble, J., in *France v. Dexheimer*, Sup. Ct., No. 1896, Cuyahoga Co.

Sec. 1697. Abandonment—What constitutes.

“The question of abandonment is one of fact and intention. Ceasing to cultivate a common field and a removal elsewhere do not make an abandonment; but to constitute an abandonment by the party it must be shown that he quit the property with the intention of no further claiming same, and the burden of showing the abandonment rests upon the one who sues.”¹

¹ *Tayon v. Laden*, 33 Mo. 205.

Sec. 1698. Adverse possession—Must extend to what.

“Where a party enters upon land without a deed or other paper title containing specific descriptions of the land by metes and bounds, or without color of title to the premises, claiming to hold them adversely, his possession only extends to that part of the tract actually improved and occupied by him, and his entry in such case, upon a part of the premises, does not give him adverse possession to uninclosed and unimproved woodland.”¹

¹ *Humphries v. Huffman*, 33 O. S. 395.

Sec. 1699. Mistake in boundary line—Nature of occupancy.

Where one of two proprietors respectively of adjoining lines holds actual, notorious, continuous, and exclusive possession up to a certain line, though not originally the true one, for a period of twenty-one years, the statute of limitation applies in his favor, and against the adjoining proprietors, although such possession might have grown out of the mutual mistake of the parties respectively, in respect to the locality of what was originally the true line between them. Then I say to you as matter of law that if you find from the evidence in this case that the plaintiff and those under whom he claims to have had actual, continuous, and exclusive possession of the land described in the petition, or any portion thereof, for a period of twenty-one years before the commencement of this action, he acquired title to the land so occupied as against the defendant and every other adult person.

The occupancy necessary to acquire title by possession is such occupancy and use of land as the nature of the particular land would require. If it is a farm, the occupancy would have to be such as a farmer would occupy, either by plowing, pasturing, mowing, or in such other ways as a farmer would usually use land. If it was city property, the occupancy must be such an occupancy as is usual for city property. * * * It will be important for you to determine from the evidence where the true line between the lands claimed by the plaintiff and the lands claimed by the defendant was. This is a question of fact for you to determine under all the evidence in the case. It will be important for you to determine whether the defendant has occupied any of the land described in the petition or not, and if he has, to what extent and how much of it he has occupied.¹

¹ Nye, J., in *Edison v. Ranney*.

Sec. 1699a. Declarations as to ownership.

Some evidence has been permitted to be given to you by the defendant as to what R. did and said while the owner was in possession of the lands now claimed by the defendant, by way of pointing out the boundaries of said land. This testimony was

permitted to be given you for the purpose of showing where R. claimed his north line was, while he was such owner and in possession of the land which he thus claimed to own. His statements and acts should be given such weight as the statements and acts of owners of lands generally, and no more. If you find from other evidence that the line which the said R. pointed out and stated as his northerly line was not the true line, then you should disregard the line which he pointed out and adopt the one which you find to be the true line between the lands claimed by the plaintiff and the lands claimed by the defendant.¹

¹ Nye, J., in *Edison v. Ranney*.

CHAPTER XCVI.

EMBEZZLEMENT.

SEC.

1700. Venue where laid—Where intention to commit is formed.

1701. By treasurer of board of education.

1702. Using funds intending to repay.

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1. The statute.

2. A fraudulent appropriation.

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SEC.

4. Agent of public officer.

5. Receipt of money by virtue of office.

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7. Reputation of defendant.

1704. By agent of insurance company.

1. Right of agent to commissions.

2. Intent.

3. Flight and change of name.

4. Venue.

Sec. 1700. Venue where laid—Where intention to commit is formed.

“If you find that the defendant received and had this money in his possession in H. County, and while it was so in his possession in H. County, he formed the intention—the purpose—to appropriate the money to his own use, and in pursuance of that purpose, so formed in H. County, he did appropriate the same to his own use, either by expending the same in S. County or any other county or place, or if he did not expend it, but in pursuance of such intention so formed in H. County, he kept the money in his own pocket with the intention of permanently depriving his employers and the owner thereof of said money, and, upon demand, with that intention, refused to pay it over, then in either case the crime would be committed in H. County. But if he received and had the money in his possession in H. County and carried the same into S. or any other county, and then for the first time formed the purpose to appropriate the money to his own use, and in pursuance of such intention he did

appropriate the same to his own use in such county, then the crime would not have been committed in H. County. If the defendant formed the purpose in H. County to convert the moneys or any of them mentioned in the indictment, but did not in fact convert them or any of them in H. County, he can not be convicted of embezzlement in this county.”¹

¹ Campbell v. State, 35 O. S. 70. But see State v. Baxter, 89 O. S. —.

Sec. 1701. By treasurer of board of education.

Embezzlement by a public officer is a fraudulent appropriation to his own use of the moneys or goods entrusted to his care by virtue of his office. Embezzlement by a public officer as applied to this case, is an unlawful and fraudulent appropriation to his own use of the money entrusted to his care and held by him as such officer. It then becomes important for you to determine from the evidence whether the defendant unlawfully and fraudulently converted to his own use the sum of \$——, or any part of all the public money of the board of education of —— Township, which came into his hands as treasurer of said board of education. In determining that question it will be proper for you to consider the manner in which he kept the money, the place where he kept it, what he did with it, if anything, and all the other facts and circumstances given you in evidence.¹

¹ Nye, J., in State v. Wideman, Medina Co. Com. Pleas.

Sec. 1702. Using funds intending to repay.

The crime charged in this indictment consists in the embezzling, and in converting to his own use, the public money described in the indictment. If you find from the evidence that the defendant unlawfully used and converted to his own use the money described in the indictment, or any portion thereof, intending to replace it, the mere fact that he intended to replace it would not exonerate him from such unlawful taking, using, and converting to his own use any of the public money which came into his hands as treasurer of the board of education of —— Township; and if he did convert to his own use any of the money

named and charged in the indictment in this case, which came into his hands as treasurer of the board of education of — Township he would be guilty of embezzlement of as much of the said money as he thus converted to his own use.¹

¹ Nye, J., in *State v. Wideman*, Medina Co. Com. Pleas.

Sec. 1703. By public officer elected or appointed.

1. *The statute.*

2. *A fraudulent appropriation.*

3. *Official capacity.*

4. *Agent of public officer.*

5. *Receipt of money by virtue of office.*

6. *Circumstantial evidence.*

7. *Evidence of other similar acts.*

8. *Reputation of defendant.*

1. *The statute.* The statute of the state under which the indictment is brought, is in the following language:

“Whoever being elected or appointed to an office of public trust or profit, or an agent, clerk, servant, or employe of such officer, or board thereof, embezzles or converts to his own use or conceals with such intent, anything of value that shall come into his possession by virtue of such office or employment, is guilty of embezzlement.”

2. *A fraudulent appropriation.* Embezzlement by a public officer appointed or elected to an office, of public trust or profit, or by the agent of such officer, is a fraudulent appropriation to his own use by such officer or agent of some thing of value that has come into his possession by virtue of his office or employment.

3. *Official capacity.* Before the state will be entitled to a verdict of guilty at your hands, it must first be proven that the defendant was either an officer elected or appointed to an office of public trust or profit, or was the agent, clerk, servant or employe of such officer.

The superintendent of banks of the state of Ohio is an officer appointed by the governor of the state with the advice and consent of the senate and he occupies an office of public trust.

The law authorizes the state superintendent of banks with the approval of the governor, to employ the necessary clerks and examiners to assist him in the discharge of the duties imposed upon him by law. The law also authorizes the state superintendent of banks to appoint one or more special deputy superintendents of banks, under his hand and official seal, as agent or agents, to assist him in the duty of liquidation of banks and distribution of their assets.

The indictment in this case charges that the money which it is charged was embezzled by the defendant, together with other moneys, came into his possession by virtue of his office of examiner and deputy superintendent of banks, and it is also stated that this is an office of public trust in the state of Ohio.

4. *Agents of public officer.* The court says to you as a matter of law, that while the office of state superintendent of banks is an office of public trust, that examiners and deputy superintendents of banks are not officers holding or occupying an office of public trust, but they are under the law of this state, the agents of such officers. It is, however, not material that the indictment characterizes the position or employment of examiner and deputy superintendent of banks as an office of public trust. If the defendant in this case was at the time stated in the indictment an examiner of banks, duly appointed, qualified and acting as such, and was also a deputy superintendent of banks duly appointed, qualified and acting as such, and if he took possession of the money which it is charged he embezzled by virtue of his position or appointment and qualifications as examiner and deputy superintendent of banks, or by virtue of his position, appointment and qualification in either capacity, and embezzled the money charged in the indictment to have been embezzled after it came into his possession by virtue of his appointment and employment, he is guilty of the crime charged, because under the statute the offense may be committed either by an officer appointed to an office of public trust or by his agent, and it is not material that the indictment may have characterized the position of examiner and deputy superintendent of banks as an office of public trust.

5. *Receipt of money by virtue of office.* The indictment charges as a fact that the defendant took possession of the money by virtue of his appointment and qualification as examiner and deputy superintendent of banks, and if he did take possession of the money under and by virtue of his appointment and qualification to these positions of agent or employe of the state superintendent of banks, or by virtue of his appointment and qualification as either examiner or deputy superintendent, he falls within the terms of the statute, and if he embezzled the money coming into his possession by reason of his position as such agent of the state superintendent of banks, he is guilty of the crime charged in the indictment.

If you find that the defendant was at the time in question duly appointed, qualified and acting as examiner of banks and deputy superintendent of banks, you will inquire whether the money charged to have been embezzled, came into his possession by virtue of his holding such position or positions under the state superintendent of banks.

To entitle the state to a conviction, it must be proven that the money charged to have been embezzled came into his possession by virtue of his occupying both positions at the time in question.

Before the defendant can be found guilty of the crime charged, it must not only be proven that he occupied the position of examiner of banks and deputy superintendent of banks, one or both, and that the money charged to have been embezzled came into his possession by virtue of his occupying this position or these positions of agent or employe of the state superintendent of banks, but it must further be proven that after the money came into his possession, he embezzled or converted it to his own use. That is, to constitute the crime charged in the indictment, it must appear that he appropriated the money to his own use, with the fraudulent intent and purpose on his part to permanently deprive the owner, to-wit, T. C. S. & T. Co., of the money which belonged to it. It must also be proven that the money belonged to the said T. C. S. & T. Co. It must also be

proven that the defendant thus fraudulently converted the money to his own use in the county of Franklin and state of Ohio.

These, gentlemen of the jury, are the necessary facts which must be proven to warrant a conviction of the defendant, and these necessary facts or elements of the crime must each and all be proven beyond a reasonable doubt to warrant a conviction of the defendant.

6. *Circumstantial evidence.* In this case, gentlemen of the jury, the state relies upon what is commonly known as circumstantial evidence, to establish the guilt of the defendant of the crime charged against him.

In criminal cases the evidence may be either direct or circumstantial, or both. If a witness sees or hears or in some way through the use of his senses, acquires knowledge of the existence of a fact to be proven and testifies to it, that is direct evidence. But it is not always possible in criminal cases to thus establish the guilt of persons accused, because often times there are no witnesses who see or hear the ultimate fact to be proven. Nor is direct evidence necessary, and the law regards circumstantial evidence as equally competent with direct evidence, the requirement of the law as to either kind of evidence being that it shall be sufficient to satisfy the mind beyond a reasonable doubt of guilt, to warrant a finding of guilty.

Circumstantial evidence is the proof of facts which stand in such relation to the ultimate fact to be proved, that such ultimate fact may be inferred from the fact proven. Each and every fact from which the existence of the ultimate fact to be proven, is sought to be inferred, must be proven beyond a reasonable doubt and the conclusion or inference of guilt should flow naturally from the facts proven. Mere opportunity to commit crime is not alone sufficient to prove that crime was committed. If the facts proven can be fairly and reasonably harmonized with the innocence of the defendant, they should be so reconciled. But if after a careful and candid consideration, and weighing of all the facts proven, they lead naturally to the conclusion that the defendant is guilty, and exclude every reasonable

hypothesis other than that of the guilt of the defendant, and satisfy your minds beyond a reasonable doubt of his guilt, then you should find the defendant to be guilty. But if after such careful and candid consideration and weighing of all the evidence in the case you are not satisfied of the guilt of the defendant beyond a reasonable doubt, your verdict should be not guilty.

7. *Evidence of other similar acts.* The state has offered evidence in this case for the purpose of establishing the fact that on other occasions the defendant was guilty of the offense of embezzling money from other banks. The object and purpose of this evidence is not to prove that the defendant appropriated the money of the T. C. S. & T. Co., but only for the purpose of establishing the intent with which the defendant took or appropriated the money of T. C. S. & T. Co., if you find he did so take or appropriate the money of T. C. S. & T. Co. You are not, therefore, at liberty to consider this evidence as tending to prove that the defendant did take or appropriate the money of T. C. S. & T. Co.; but if you reach the conclusion under the rules stated to you that he did so take or appropriate the money of T. C. S. & T. Co. and you further find from the evidence beyond a reasonable doubt that he embezzled money from other banks on other occasions, then you have a right to consider such other embezzlement or embezzlements on the question of the intent or purpose of the defendant in taking the money of T. C. S. & T. Co.

8. *Reputation of defendant.* The defendant has offered evidence tending to establish the fact that prior to the commission of this offense he bore a good reputation in the community where he lived. It is your duty to consider this evidence along with all the other evidence in the case on the question of the guilt or innocence of the defendant. A defendant in a criminal case has a right to give evidence concerning his former good reputation and character. This is not because previous good reputation and character are any defense against the charge of criminality. Its object and purpose is that it may be placed in the scales by the jury when weighing the evidence to determine the question of the guilt or innocence of the defendant, and as tending to raise a presumption that one possessing such a

previous good reputation and character would not be likely to commit the crime charged. But it is the common observation of all men that temptation will at times subvert character and overcome integrity and fidelity to duty and lead men whose past lives have given no indication of such weakness, into the commission of crime. But it is also the common observation of all men that men of good reputation and character are not so likely to commit crime as those whose past lives have given plain indication of their want of integrity and fidelity to duty. It is your duty therefore, gentlemen of the jury, to consider this evidence along with all the other evidence in the case and give to it such weight as in your judgment it is entitled to receive in determining the question of the guilt or innocence of the defendant of the crime charged against him.¹

¹ State of Ohio v. C. S. Baxter, Com. Pleas Court, Franklin County, O., Bigger, J.

Sec. 1704. By agent of insurance company.

1. *Right of agent to commissions.*
2. *Intent.*
3. *Flight and change of name.*
4. *Venue.*

The indictment charges that the defendant was the agent of the insurance company, and that it was in this capacity of agent that he embezzled the money in question. The defendant does not deny that he was acting in the capacity of agent of the insurance company, but on the contrary he admits that he was acting as agent of the company, and also admits that as such agent he collected this money that he is charged with embezzling. But he says that he was entitled to retain it under the terms of his contract with the insurance company. It becomes your duty, therefore, gentlemen of the jury, to determine what the contract was between the insurance company and the defendant, and this you must do from a consideration of all the evidence in the case.

1. *Right of agent to commissions.* The defendant had a right to retain his commissions which the contract allowed him as

compensation for the sale of stock in the insurance company from the money received from the sale of the stock, but he would not have a right to retain commissions due him under his agreement to act as agent of the insurance company in the sale of life insurance from the moneys received for the sale of stock, unless you find that under the terms of the contract he was to be permitted to retain his commissions earned as agent for the sale of life insurance from moneys received from the sale of the stock. But if the contract permitted him to retain his commissions from any moneys coming into his hands, without regard to whether it came from the premiums paid for life insurance or the moneys derived from the sale of stock, then he would have a right to retain any commissions due him for acting in either selling stock or selling insurance, from the moneys derived from the sale of stock.

It will also be important for you to consider what amount was due to him as commissions. The defendant claims that the insurance company owed him for commissions on orders for stock, which the evidence shows was never paid for by the persons who ordered it. What was the agreement upon that point? Was he to receive his commission upon obtaining the order, or only upon payment for the stock? If he was to receive his commissions as soon as he had obtained the order for the stock, then he would be entitled to his commissions whether the persons ordering it paid for it or did not pay for it. But if he was to receive the commission only in case the persons ordering it paid for it, then he could not claim commissions unless the stock was paid for.

2. *Intent.* Criminal intent is an essential element of the crime charged, and before the defendant can be found guilty it must also appear, not only that the defendant converted this money to his own use, or some part of it, but that he so converted it with the criminal intent of depriving the owner, the insurance company, of it. Furthermore, as a felonious or criminal intent is an essential element of this crime, if you find that the defendant in good faith believed—that under his con-

tract he was entitled to retain all this money in payment of commissions due him, he will not be guilty of the crime charged, although he may have been mistaken in that belief. But if he honestly believed he was entitled to retain the entire amount here charged to have been embezzled, while as to all of it or some part of it he was not in fact entitled to retain it, then although the company could recover it back in a civil suit he can not be held criminally liable, and for the reason stated, that criminal intent is an essential element of the offense charged.

Intention, gentlemen of the jury, is a state of the mind and can ordinarily only be arrived at by a consideration of all the evidence, and the facts and circumstances, with the transactions, including any statements which the defendant himself may have made upon the subject.

3. *Flight and change of name.* The undisputed evidence shows, gentlemen of the jury, that the defendant left shortly after he received the last of this money, and removed to the state of Indiana, and that he was there arrested, and that he had assumed another name. These are circumstances which you have a right to consider as reflecting upon the condition of his mind at the time when he received this money, and upon the question of his intention and belief at the time he received the money. The weight to be given to it is a question which must be left to your sound judgment and discretion, and to be considered in connection with all the other facts and circumstances disclosed by the evidence.

You will also observe, gentlemen of the jury, that the crime charged in this indictment can not be made against persons under the age of eighteen years, or against an apprentice. The defendant has testified that he is thirty-two or thirty-three years—thirty-three years of age. As only minors can be apprentices under the law of this state, it sufficiently appears therefore that the defendant is neither an apprentice nor under the age of eighteen years.

If you find that the defendant did commit embezzlement of this money, or some part of it, it will be your duty to inquire

whether the offense was committed in this county of Franklin; because the defendant can not be found guilty unless the offense was committed in this county.

4. *Venue*. If you find the fact to be that the defendant under the terms of the contract was required to make report to the insurance company in this county, and to account to it at its office here in the city of Columbus, Franklin county, for the moneys collected by him, and if you further find that in the discharge of this duty he corresponded with the insurance company, sending letters to it and receiving letters from it concerning these moneys which he had collected, and if on receipt of communications from the company demanding settlement he sent checks in settlement or partial settlement of his account to the insurance company, in this county, which checks were returned to the company unpaid for want of funds in the bank on which they were drawn, then I say to you that you will be warranted in finding that the offense was committed in this county. But if you find the fact to be that the defendant under the terms of his contract was required to account to another agent of the insurance company, not located in this county, then he can not be found guilty.

If you find that the defendant is guilty as charged, it will be your duty to determine how much of the money belonging to the insurance company was embezzled by the defendant. Before the defendant can be found guilty the proof must satisfy you beyond a reasonable doubt of the guilt of the defendant, and that he did embezzle either all of this money, or some specified portion of it.

It is not essential to a conviction that you should find that he embezzled all that is charged in the indictment, but the proof must satisfy you that as to some portion of it he committed the crime of embezzlement; and you will, if you find the defendant to be guilty, return in your verdict the amount which you find he did embezzle.¹

¹ *State v. Daugherty*, alias *Brown*, Court of Com. Pleas, Franklin County, Ohio, Bigger, J. See *ante*, sec. 1700; *Campbell v. State*, 35 O. S. 70 as to elements of crime and venue; also *State v. Baxter*, 89 O. S. —.

CHAPTER XCVII.

EMINENT DOMAIN—APPROPRIATION OF PROPERTY.

- | SEC. | SEC. |
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| 1705. Right of way for railway purposes—Constitutional provisions. | 1713. What use will justify taking private property for drainage. |
| 1706. Rules for assessing compensation. | 1714. Same—Benefits to private individuals for cultivation not sufficient. |
| 1707. Opinions of witnesses as to value of property. | 1715. Drainage proceedings—Burden as to question of use. |
| 1708. Expert testimony. | 1716. Same continued—Number of petitioners. |
| 1709. Assessment of compensation for land—Rules concerning—Market value. | 1717. Same continued—Determination of line of construction of ditch—Considerations to be observed. |
| 1710. Right of public to improve and use public highway—Construction of railroad in highway a new use. | 1718. Same continued—Compensation for lands taken. |
| 1711. Appropriation for telegraph line. | 1719. Same continued—View of route by jury. |
| 1712. Drainage law—Object of. | |

Sec. 1705. Right of way for railway purposes—Constitutional provisions.

The P., P. & F. Railway Company, the plaintiff in this proceeding, filed its petition herein to appropriate to its uses and ownership the premises described therein, and which you have already inspected and examined. It is the right of the plaintiff to take this land, but before this can be done the value thereof must be found and paid in money.

The constitution of our state provides that no right of way shall be appropriated to the use of any corporation until full compensation therefor be first paid in money, or first secured by a deposit of money to the owner, irrespective of any benefit from any improvement by such corporation, which compensation

shall be ascertained by a jury of twelve men in a court of record, as shall be prescribed by law.¹

¹ Geo. H. Shepard, Probate Judge. Affirmed in *P., P. & F. Ry. Co. v. Paine*.

Sec. 1706. Rules for assessing compensation.

By reason of the provision of the law, made under this clause of the constitution, you have been summoned, empaneled and sworn to render full compensation to this defendant for the land sought to be taken from him in this proceeding. The only duty then devolving upon you in this case is to ascertain and declare by your verdict, how much money will make full compensation to this defendant for the premises described in the petition, and which are sought to be taken by the plaintiff. We say to you that the premises sought to be appropriated extend to the center of the river, subject to the rights of the public to use the river.

We say to you that full compensation, in this case, means the fair cash market value of this land as it is at the present time and as you viewed it, without any regard to the causes that may have contributed to make up its value.

By fair cash value is meant as much as the owner might fairly expect to be able to sell it for to others, if it were not taken by the plaintiff. Such a price as it would bring if put in the market. Not what it would bring at a forced sale, or under peculiar circumstances, but such sum as it would bring in the market, that is to persons generally, if those desiring to purchase were found who were willing to pay its just and true value. We say to you that the necessity of the plaintiff to have these premises, nor the unwillingness of the defendant to part with them should have no consideration in arriving at your verdict. Neither of these constitute any element of market value. It is the market value as contradistinguished from any special value to the plaintiff, or any other corporation or to any individual. You should consider the location of the premises in question, the best purposes for which they are or may be used, their surround-

ings, their present condition, with reference to arriving at fair market value. If you find that these premises have any special value, for any purpose, whether it is for the purpose for which it is now used or for any other purpose, which affects its value in the market, you may take that into consideration. You are under no obligation to consider the bare value of the land, with the value of the filling and docks thereon added. The value should be considered with reference to the value as a whole as it is there now, for the best purposes to which it may be applied. The nature and condition of the harbor on which these premises are located, the business done on the premises and in the locality, nature of the improvements on this land, its general availability, may be considered by you in your deliberations.

The value is to be estimated, having regard to the existing business and wants of the community, or such as may be reasonably expected in the near future.¹

¹ Geo. H. Shepard, P. J. Approved in P., P. & F. Ry. Co. v. Paine, by circuit and supreme courts.

We think a more full explanation might be given the jury as to what kind of compensation is contemplated by the constitution, and so the following is appended.

Note on Allowance of Benefits.

The jury must consider the real value of the realty, may take into account not only the present purpose to which the land is applied, but also any other beneficial use to which, in the course of events, at no remote period, it may be applied. 30 O. S. 111. It is the actual as distinguished from the speculative loss that must guide the jury. The jury must consider the real value of the land taken, the diminished value of the remainder, and may for that purpose take into account, not only the purposes to which the land is or has been applied, but any other beneficial purpose to which it may be applied, which would affect the amount of compensation or damages. 30 O. S. 108. That is what is said in the Longworth case (30 O. S. 108), and would seem to permit benefits from the proposed work to be taken into consideration in estimating the compensation or damages to be awarded. In 9 W. L. B. 253, and in 29 W. L. B. 260, it is held that special benefits can be considered so far as to offset damages to property remaining; that special benefits may be considered.

This matter is regulated by constitutional provisions, Art. 1, sec. 19, and Art. 13, sec. 5, the first requiring compensation to be made without deduction for benefits, when the property is appropriated to a public

use, and the other providing for compensation irrespective of benefits, where it is taken by a corporation for a right of way, which two provisions are held in *Giesy v. R. R. Co.*, 4 O. S. 309, in legal effect to be identical.

Whether, therefore, property is appropriated directly by the public or through the intervention of a corporation, the owner is entitled to receive its fair market value at the time it is taken—as much as he might be able to sell it to others for, if it was not taken; and that this amount (says Judge Ranney, 4 O. S. 332) is not to be increased from the necessity of the public, or the corporation or the public to have it, on the one hand; nor diminished by any necessity of the owner to dispose of it, on the other. It is to be valued precisely as it would be appraised on sale on execution, or by an executor or guardian; and without regard to any external causes that may have contributed to make up its present value. The jury are not required to consider how much, nor permitted to make any use of the fact that it may have increased in value by the proposal or construction of the work for which it is taken. To allow this to be done would not only be unjust, but would effect a partial revival of the very abuse which it was a leading purpose of these constitutional provisions to correct. Judge Ranney says that: “It would be unjust, because it establishes for a corporation what is done for no one else—a sort of right in the property of others, to the reflected benefits of its improvements; itself submitting to no reciprocity by affording to others a compensation for the effect of their improvements upon the property of the corporation. And it is doubly unjust where, as must very often happen, the increase in value accrued to the benefit of the former owner, and has been bought and paid for by the present holder, from whom the property is taken at a diminished price.”

The language of the constitution is: “Until full compensation—irrespective of any benefit from any improvement proposed by such corporation.”

It seems perfectly plain that this intended that the benefits which the remainder of the property might derive from the advantages of the railroad, should not be taken into account as against the value of the land taken. But as said in *R. R. Co. v. Collett*, 6 O. S. 186, there are two kinds of benefits accruing from the construction of a railroad to an owner of land through which it passes. First: General benefits, or such as accrue to the community, or the vicinity at large, such as increased facilities for transportation and travel, and the building up of towns and consequent enhancement of the value of lands and town lots. Second: Special benefits, or such as accrue directly and solely to the owner of the lands from which the right of way is taken; as when the excavation of the railroad track has the effect to drain the morass, and thus to transform what was a worthless swamp into valuable, arable land, or to open up and improve a watercourse.

It was the express design of the constitution to exclude general benefits from consideration. But it is perfectly reasonable that after full compensation for the land actually appropriated for the right of way, in view of all its uses and relations, without deducting for benefits of any kind, the jury may in their estimate and assessment consider incidental damages to other lands of the owner from the construction of the road, and make allowance for incidental benefits. This the court in the 6 O. S. 186, refrained from deciding. The rule then seems to be: General benefits accruing from the work can not be considered to deduct the compensation. Special benefits may, after full compensation allowed, be taken into consideration to offset other damages to other lands.

Sec. 1707. Opinions of witnesses as to value of property.

Having called your attention to what is meant by "*full compensation*," which the law and constitution guarantees to this defendant, we come now to consider the means for arriving at the rest. It is a general rule in law that witnesses can only state facts within their knowledge. In this case, however, witnesses have been called to give their opinions concerning the value of the premises in question, and from these opinions the jury form its opinion. You are not bound, however, to take these opinions for more than you consider them worth. Opinions, like most everything else, vary in value, and like other things are dependent upon something else for their worth. It is the value of the opinions of the witnesses that have testified in this case that you should consider in arriving at the market value of the premises. We say to you that one of the chief elements in the value of an opinion is the knowledge which the witness has of the subject matter of which he testifies. Not the knowledge which he professes, but that which he actually possesses. If the witness has no more knowledge of the subject than men generally possess, or the juror possesses, then his opinion is no better. You are, therefore, in the case now before you, to look well to the foundation of the opinion, each and every witness that has been called. What means has he of knowing about the value of this land? What opportunities have been offered him?

Another element in the value of an opinion is its freedom from interest, bias, or feeling. These are so apt to mould, fashion, and foster an opinion, on that, great caution should be taken in receiving an opinion where these things exist and abound.

We have said thus much that you may the more intelligently understand the application of the law to the evidence in this case and which must be considered by you.¹

¹ Geo. H. Shepard, P. J., in *P. P. & F. Ry. Co. v. Paine*, approved by Circuit and Supreme Courts. No. 3024 S. C.

Sec. 1708. Expert testimony.

The parties in this case have called as witnesses what are known in law as non-professional experts. This is a class of persons who, by their especial means of observation or peculiar advantages, have better or more extended means of knowing of the value of the premises in controversy, and it is your province to give each and every witness produced just such weight and credit as you think he is entitled. You should carefully inquire into his means of knowledge, what opportunity he has for observing and ascertaining the value of this land, what feeling or prejudice he has in the case, what interest in the proceedings.

Sec. 1709. Assessment of compensation for land—Rules concerning—Market value.

You are sworn to justly and impartially assess, according to your best judgment, the amount of compensation due to the owner of this land in this case. This is the question, and the only one for you to determine. But in the determination of this question there are two ways you are to consider it. First, you should find what the land actually taken and used by the railroad company is worth; that is, this strip of land fifty feet in width and extending across the whole tract, containing, as the petition avers, three and 30-100 acres of land.

What is this land worth? Not as a strip severed and cut out of the whole tract, but what is it worth as a part of the whole tract, taken in connection with it, and without the railroad upon it? Having found what the land taken, that is, the three and 30-100 acres, is worth, then you are to find how much less valuable the remaining part of said land will be rendered by reason of the taking of the strip of land out of it and using the same for building and operating thereon a railroad, as it is now being occupied. That is, you are to say what the damage is, if any, which this land-owner sustains by reason of the construction of this railroad across his land. You were permitted to go and see for yourselves the property of the plaintiff and the location of the railroad across the same. The road having been already constructed, you are the better enabled to see just how it affects the remaining part of plaintiff's land.

You are to find the actual or market value of the land taken; the actual, as distinguished from any speculative loss the land-owner may sustain. This is the rule that must guide you. But I say to you that you have a right to consider and take into account not only the present use of the land and its value for that purpose, but also any other more beneficial purpose to which, in the course of events at no remote period, it may be applied.

A map or plat has been offered in evidence for the purpose of showing the location of the property and the course of the railroad through the same, and its availability for subdivision into lots. For this purpose only the map is admitted and can be considered as evidence by you, and in this way you may consider it.

If you find from the evidence that this land, or a part of it, is available for such subdivision into lots, you should take this fact into account. But it is the value for so dividing, and not the value of the lots when the division has in fact been made.

The plaintiff is entitled to a compensatory and not a speculative remuneration for the land taken, and for the diminution,

if any, in value to the remainder of the land occasioned by the appropriation of the land taken for the use of a railroad; and the difference between the actual value of the plaintiff's property without the railroad, and the value of the same property with the railroad as located, is full compensation, and all to which the plaintiff is entitled. In arriving at the amount of compensation to be awarded to the plaintiff, you must not take into consideration facts of a contingent and prospective character, such as the probable amount that may be derived from sales of the property when hereafter divided into building lots and sold as such lots; but you must ascertain the value of the land taken, and diminution in value of the remainder, or injury thereto, occasioned by the taking in view of its present character, situation and surroundings.

It is the value at the time of the commencement of these proceedings, that is, the present term.

The duty devolved on you in this case is to determine and assess the fair market value of the land which the proof shows you has been taken, as well as the diminution in value at their fair market price of the residue of the lands not taken, and you can not make any use of the fact that the land is increased in value by the construction of the proposed railroad upon it, nor can you make any use of the fact, if it be a fact, that after the taking and the construction of the railroad upon it, manufacturing works are located upon a part of the tract of which at the time of the taking there was no existence, nor probability of such location.

If you find from the evidence that a portion of said tract, described in the petition as one hundred and sixty-three acres, has been laid out into lots, separated from the balance of the tract and sold, such lots or tracts so cut off and sold should not be considered by you as a part of the property of the plaintiff, or as in any way affecting his rights in this case.¹

¹ From *P. & W. R. R. Co. v. Perkins*, Supreme Court, unreported. No. 1710.

Sec. 1710. Right of public to improve and use a public highway—Construction of railroad in highway a new use.

“As between the public and the owner of land upon which a common highway is established it is settled that the public has a right to improve and use the public highway in the manner and for the purposes contemplated at the time it was established. The right to improve includes the power to grade, bridge, gravel, or plank the road in such a manner as to make it most convenient and safe for use by the public for the purposes of travel and transportation in the customary manner, which is well understood to be by the locomotion of man and beast, and by vehicles drawn by animals, without fixed tracks or rails to which such vehicles are confined when in motion. These constitute the easement which the public acquires by appropriating land for the right of way for a highway, and these, in legal contemplation, are what the owner is to receive compensation for when his land is appropriated for this purpose. The fee of the land remains in the owner; he is taxed upon it; and when the use or easement in the public ceases it reverts to him free from incumbrance.

“In the exercise of the right of eminent domain, the state, through the general assembly, may delegate to a railroad corporation the power to appropriate a right of way for its road along and upon a public highway. * * * In such case, the rights of the public and the rights of the owner are entirely distinct; and the consent, expressed or implied, of one to the appropriation would not bind or affect the rights of the other. * * * The railroad company, by occupying the highway, constructing its track, and operating its trains thereon by steam motive power, completely diverted the highway from the uses and purposes for which it was established. This new use, to which the highway has been diverted, imposes burdens on the land that are entirely different from, and in addition to, those that were imposed by the highway. The right to so divert the use, and impose additional burdens on the land, could only be acquired by the corporation by agreement with the owner, or

by appropriating and making compensation therefor in the mode prescribed by law.”¹

¹ Daily v. State, 51 O. S. 348.

Sec. 1711. Appropriation for telegraph line.

“Upon the question as to the rights of the telegraph company, the court says to you that at the time of the erection of the poles and the construction of the telegraph line, whether in 1882 or in 1884, the land upon which this highway was situated was the property of Mr. T., subject to the right of way for public use for a highway; that is, for travel and keeping it in repair as a highway.

“As between Mr. T. and other individuals or corporations, it could be used for no other purpose without entitling him to compensation for such use, and the entry of this telegraph company upon his land without compensation to him or without an agreement between him and such corporation, if you find this corporation did so enter, was not a rightful entry or occupancy; and as to the trees growing upon his land at the time such company constructed its lines, as between him and such corporation, he had the right to have the trees remain and grow there without injury, whether such injury was necessary or not to the use of the lines of such telegraph company. The United States could not, nor has it attempted to take away by any statute that right. Mr. T.’s right to maintain the trees in the ordinary way was an absolute right, and this right could be taken from him in no way until such time as they acquired the right to maintain such lines by prescription, which means actual occupancy for twenty-one years or more, or by appropriation or agreement; and for this company, by its agents, without first acquiring the right, to enter upon this land and to cut the trees growing thereon would be proceeding without lawful authority.”¹

¹ Approved in Daily v. State, 51 O. S. 348.

Sec. 1712. Drainage law—Object of.

As to the first proposition the court will instruct you that the object of the law is to provide means for drainage whenever

the public health, convenience or welfare require it. It is not essential that the public at large shall be benefited, but only that part of the public affected by want of proper drainage, or by the improvement to be made. The injury from want of drainage and the benefit to be derived from the ditch are necessarily local in their nature. Public welfare, health and convenience in this connection are terms used in contradistinction from mere private benefit. A nuisance is said to be public when it affects the surrounding community generally, and impairs the rights of neighboring residents as members of the public, and private when it especially injures individuals.

The mere fact that the proposed ditch would enable the parties to raise more corn will not authorize a finding in favor of the establishment of the ditch.¹

¹ Marsh v. Phelan, Clark Co. Approved by C. C. and S. C.

Sec. 1713. What use will justify taking private property for drainage.

The use that will justify the taking of private property by the power of eminent domain is the use for the government, the general public, or some portion of it, and not the use by or for particular individuals, or for the benefit of certain estates. The use may be limited to the inhabitants of a small locality; but the benefit must be in common and not to a very few persons and estates. The property of each individual conduces in a certain sense to the public welfare, but this fact is not sufficient reason alone for taking other property to increase the prosperity of individual men.

The drainage of marshes and ponds may be for the promotion of the public health, and so become a public object; but the drainage of farms to render them more productive, *alone*, is not such an object.

The fact that there are other public ditches near does not affect the right to locate the proposed ditch, if the public health, convenience or welfare demand the proposed ditch. Neither is

it the length of a proposed ditch, but the extent of the drainage to be affected by it that determines the power to establish it.

The location of one ditch by the trustees of the county commissioners to drain certain territory will not prevent the establishment of other ditches to drain the same territory, provided that the public health, convenience or welfare demands such ditch.

The jury shall take into consideration the testimony tending to show that the proposed ditch is located upon the line of a ditch located, established and kept open by the township trustees of ——— township, ——— county, O., in determining the question as to whether the ditch petitioned for will be conducive to the public health, welfare and convenience; and also, whether the route thereof is practicable.¹

¹ Marsh v. Phelan. Approved by circuit and supreme courts.

Sec. 1714. Same—Benefits to private individuals for cultivation not sufficient.

The mere fact that the ditch might enable A. P. to raise larger or better crops, or even to cultivate a part of his land which he could not before cultivate, is a fact going to show that he would be privately benefited, but this is not sufficient to authorize you to return a verdict finding that said ditch will be conducive to the public health, welfare and convenience. The evidence derived from your view of the premises and the testimony of witnesses must show you that the establishment of said ditch will be conducive to the public health, convenience and welfare without regard to private benefits before you can return a verdict in favor of the establishment of said ditch. The advantage, convenience or welfare of one or more individuals is not sufficient reason for the establishment of a public ditch for which private property can be taken and assessments made to pay therefor.

Even if it appears that the proposed ditch will only advantageously drain the lands of A. P., or other individuals, so that

their lands will be better adapted to agriculture, or rendered more valuable in any way, this will not be sufficient to authorize you to find in favor of said ditch. To do so, it must affirmatively appear to you from your view of the route and the testimony of witnesses, that the community generally about said proposed ditch will be benefited in health, convenience or welfare by the establishment of the same. If said ditch does not affect the community generally, but only benefits the property of certain individuals, it will be your duty to find that said ditch will not be conducive to the public health, convenience or welfare.¹

¹ Marsh v. Phelan. Approved by C. C. and S. C.

Sec. 1715. Drainage proceedings—Burden as to questions of use.

The burden of proof on the questions as to whether the proposed ditch will be conducive to the public health, convenience or welfare, is upon the party seeking the establishment thereof, and if you do not find by a preponderance of the evidence, from your view of the premises and the testimony of witnesses that the proposed ditch will conduce to the health, convenience or welfare of the public generally in the vicinity of the same, it will be your duty to find that said ditch will not be conducive to the public health, convenience or welfare.¹

¹ Marsh v. Phelan. Approved by C. C. and S. C.

Sec. 1716. Same continued—Number of petitioners.

One petitioner is sufficient, and in order for the ditch to be for the public health, convenience or welfare, the whole land from which the benefit is to be derived may be owned by one person only. So, if you find, under the rules stated, that the proposed ditch would better drain the land of A. P., and thereby be conducive to the public health, convenience or welfare, it will be your duty to find in favor of the ditch.¹

¹ Marsh v. Phelan. Approved by C. C. and S. C.

Sec. 1717. Same continued—Determination of line of construction of ditch—Considerations to be observed.

You are to determine whether the route of the proposed ditch is a practical one—that is, you are to say whether or not if the ditch be constructed upon the line and route as determined upon by the commissioners it will reasonably meet the ends and objects for which the construction has been sought.

In determining this matter, you should consider the route as located, in relation to the surrounding lands, the outlet provided, and generally whether it will serve the purpose for which it was intended, and that it will drain, or aid in draining, the land near or through which it extends.

In the location of such a ditch it was not necessary that the natural flow of the water be followed, but only that the route determined upon be a practicable one.

The burden of proof upon the question as to whether the route of said ditch is practical is upon the party seeking the establishment thereof, and if you do not find by a preponderance of the evidence from your view of the premises and testimony of witnesses, that the route of the ditch is practicable for the purposes sought to be attained thereby, it will be your duty to find that the route of said proposed ditch is not practical.¹

¹ Marsh v. Phelan. Approved by C. C. and S. C.

Sec. 1718. Same continued—Compensation for lands taken.

You are to determine how much compensation is due to S. M. for the lands appropriated for the construction of this ditch upon the proposed route. The value of the lands actually used for the ditch must be allowed her. In considering this question, the fact that she might receive benefits from the proposed ditch can not be taken into consideration in allowing or fixing her compensation.

You must allow her just such sum as will compensate her for the loss of land used in the construction of the ditch.

The fair market value in cash at the time it is taken must be allowed her.

There is a difference between the terms "compensation" and "damages." Compensation means an appropriation for land actually used in making and constructing the ditch. Damages is an allowance made for any injury that may result to the lands affected by reason of the ditch to be constructed.

You are to determine what damages, if any, are due to S. M. for property affected by this proposed ditch.

In determining the damages you will consider how much less valuable, if any, the remaining lands will be by reason of the construction of the ditch.

Where land is appropriated for a public use, a compensation, not a speculative remuneration, is guaranteed by the law for the land taken and for damages occasioned thereby to the remainder of the premises. The differences in value of the owner's property with the appropriation and that without it is the rule of compensation. This difference must be ascertained with reference to the value of the property in view of the present character, situation, and surroundings.

Under the head of damages may be considered the fact whether the proposed ditch will cause any overflow of Mrs. M.'s premises, or backwater upon it, or will destroy the symmetry of her land, or access to, or egress from it, or any actual damage that will result to her premises by reason of the reconstruction of the proposed ditch. But these damages must be actual and not speculative. If you find that her premises will not be injured in any respect whatever by said ditch, if located, that the land will be benefited as much or more than it will be injured by the proposed ditch, you may allow her no damages.¹

¹ Marsh v. Phelan. Approved by C. C. and S. C.

Sec. 1719. Same continued—View of route by jury.

You were ordered to view the whole route, as located by the county commissioners, of the proposed improvement and the lands surrounding. This was for the purpose of enabling you

to determine the questions in this case, and to apply your own judgments in regard to them as well as to the better understanding of the evidence given, and in making up your verdict you will consider both the facts appearing to you from the view of the premises and the evidence adduced.

You are to determine the questions presented to you in this case not alone on the evidence of witnesses, but also from your view of the route of the proposed ditch.¹

¹ From Marsh, *et al.*, v. Phelan, *et al.*, Clark County. Probate Court was affirmed by the Circuit Court, and the latter was affirmed by the Supreme Court.

CHAPTER XCVIII.

ESTOPPEL.

SEC.

1720. Defined.

1721. Conduct must cause prejudice
or injury.

SEC.

1722. Intent to mislead not essen-
tial.

1723. Statement must be acted upon.

Sec. 1720. Defined.

“Where one person, by his acts or declarations made deliberately and with knowledge, induces another to believe certain facts to exist, and that other person rightfully acts on the belief so induced, and is misled thereby, the former is estopped to afterwards set up a claim based upon facts inconsistent with the facts so relied upon, to the injury of the person so misled. This definition embraces all the essential elements of an estoppel. It will be your duty to examine the evidence, and ascertain whether all these elements are proved in this case.”¹

The doctrine of estoppel is founded on principles of morality and is intended to subserve the ends of justice. It is a doctrine when properly understood and applied, that concludes the truth in order to prevent fraud and falsehood, and imposes silence on a party when in conscience and honesty he should be allowed to speak.²

¹ From *Pennsylvania Co. v. Platt*, 47 O. S. 366.

² *Van Ransselaer v. Kearney*, 11 How. 297; *Bowen v. Howenstein*, 39 App. Cas. (D. C.) 585. Am. Ann. Cas. 1913, E. 1179.

Sec. 1721. Conduct must cause prejudice or injury.

The jury are instructed that a person is not estopped from denying the truth of his own statements, unless it appears that they were made in bad faith, or fraudulently, or their equiva-

lent, gross negligence, or that the party setting up or claiming such estoppel has been prejudiced thereby.¹

¹ *McKinzie v. Steele*, 18 O. S. 38. An act must be both injurious and willful. *Nye v. Denny*, 18 O. S. 246; *Penn. Co. v. Platt*, 47 O. S. 366. It is of the essence of estoppel that the act relied upon should have been injurious. *Smith v. Powell*, 98 Va. 431; *Lincoln v. Gay*, 164 Mass. 537, 49 Am. St. 480.

Sec. 1722. Intent to mislead not essential.

The jury is instructed that it is not necessary to constitute an estoppel that a party should intend or design to mislead; it is enough if the act or declaration was calculated to and did in fact mislead another who acted in good faith and with reasonable diligence.¹

¹ *Rosenthal v. Mayhugh*, 33 O. S. 155; *Beardsley v. Foot*, 14 O. S. 414; 14 O. S. 102; *Blair v. Wart*, 69 N. Y. 113.

Sec. 1723. Statements must be acted upon.

The jury are instructed that before a party can be estopped from denying the truth of any statement it must appear from the evidence that such statements have been acted upon by another, and that they were acted upon in ignorance, differently from what he otherwise would have done, and that such person will be injured by allowing the truth of the admission by the declaration or conduct so acted upon by him to be disproved.¹

¹ *Penn. Co. v. Platt*, 47 O. S. 366, 1 *Greenleaf's Ev.*, sec. 209.

CHAPTER XCIX.

EVIDENCE—WITNESSES.

SEC.

1724. General instruction as to the evidence.

1725. Preponderance and weight of the evidence.

1726. Evidence and testimony distinguished—Weight of evidence may be shown by greater or less number of witnesses as jury may view it—Weight may be shown by circumstances or inferences.

1727. Declarations, statements or admissions.

1728. Declarations against interest in criminal case.

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1730. Credibility of witnesses.

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1732. Credibility of witnesses—Jury to consider physical conditions, possibilities or improbabilities.

SEC.

1733. Jury not at liberty to indulge in capricious disbelief of testimony.

1734. Circumstantial evidence.

1735. Same—Another form.

1736. Circumstantial evidence continued.

1737. Negative and affirmative evidence.

1738. Weight given medical expert testimony as to personal injury.

1739. Medical testimony as to nature of human blood.

1740. Uncorroborated testimony of accomplice.

1741. Previous good character in criminal case.

1742. Conduct importing guilt.

1743. Testimony as to recognition of accused.

1744. Flight of accused.

1745. Consideration of improper unanswered questions.

1746. Conflict of testimony.

1747. Reasonable doubt.

1748. Drunkenness no excuse for crime—May be considered for what purpose.

Sec. 1724. General instruction as to the evidence.

In determining the issues of fact in this case, you will take into consideration all the evidence bearing upon the respective questions.

The evidence is not what counsel on either side said to you in the opening statement they expected the testimony to show; not what they have said to you in the course of the argument, nor to the court in your presence; nor is it what I may state to you as my recollection of the testimony in the charge.

The opening statement is made to enable you to understand the testimony as it is offered. The argument is to assist you in reaching a proper conclusion, the charge is to give you the law, which shall guide you in your deliberations. The evidence is what the witnesses have been permitted to say to you while upon the witness-stand.

You are made the sole judges of all questions of fact. You must determine the facts from the evidence in the light of the law as I have stated it to you.

You are the sole judges of the credit to be given to the witnesses, and of the weight of the evidence. Bear in mind that the court is to determine the competency, the jury the weight. Courts admit evidence not by reason of its weight, but because of its tendency to prove or disprove the issue; leaving its truth or falsity and its weight to the jury.

You may believe or disbelieve all that a witness has testified to, or you may believe or disbelieve a part.

In determining the credit to which a witness is entitled, and the weight which shall be given to his evidence, you may properly take into account his interest in the result of the trial, his relation to the parties to the suit, the influence he may be under, his kinship to the parties, if any, and his demeanor upon the witness-stand.

A witness who goes upon the witness-stand and frankly gives testimony without regard to whether it be for or against the party calling him as a witness, giving testimony in accordance with admitted facts in the case, or that is corroborated by other witnesses, presents strong claims to credence at your hands.

Upon the other hand, a witness who goes upon the stand and freely gives testimony for the side calling him, but who testifies unwillingly upon the other side, or who becomes pert and im-

puident on cross examination, presents no such claims. The testimony of such a witness should be carefully scrutinized by the jury.

In weighing the evidence you should take into account the means or opportunities of the witness to have knowledge about the matters testified to. You should also take into account the probability or improbability, the possibility or impossibility of the story told by the witness.

In determining the facts, gentlemen of the jury, you should proceed upon the theory that all the witnesses have tried to testify truthfully. If there be conflict in the evidence, as there is in nearly every case, you should, if possible, reconcile it with the truth and find the facts.

Sec. 1725. Preponderance and weight of the evidence.

By preponderance of the evidence is meant evidence that you, in your jury room, considering the evidence and weighing it, conclude is the evidence that you believe and that influences your minds in arriving at the conclusion you reach.

The weight of the evidence does not necessarily mean that one side has more witnesses than another; it simply means that if, when weighing all the testimony of all the witnesses with reference to their credibility, correctness of memory, and to the circumstances surrounding their testimony, appearing in the case, the evidence of one side outweighs that of another, then such side is said to have the weight of the testimony. The jury are the sole judges of the weight of the testimony and the credibility of the witnesses. If one witness testifies directly opposite to another, the jury is not bound by that fact to regard the weight of the evidence as evenly balanced. The jury has the right to determine from the appearance of a witness on the stand, his manner of testifying, his apparent candor, his apparent intelligence or lack of intelligence, his relationship, business or otherwise, to the party, his interest, if any may appear from the evidence, his temper, feeling or bias, if any; and from this and all other circumstances appearing in connection with the testi-

mony on the trial the jury has the right to determine which witness is the more worthy of credit, and to give credit accordingly. But, of course, if the witnesses are otherwise equally creditable, greater weight should be given to the testimony of those who swear affirmatively to the fact, rather than those who swear negatively as to the want of knowledge or recollection. So if the witness is an employee of either party and the jury should believe that the witness has testified under fear of losing his employment, or a desire to avoid censure or fear of offending, or a desire to please his employers, such fact may be taken into account in determining the degree of weight which ought to be given to the testimony of such witness. But men are not under suspicion or disability as witnesses simply because they are employees, and it will not do to assume that the man has disregarded his oath and is unworthy of belief simply because he is an employee. It is for you to determine whether his relation has or has not in any way embarrassed or restrained him from telling the truth.

Another Form.—In speaking of proof—preponderance of proof—it is perhaps hardly necessary to say to the jury that testimony is not to be measured by the number of witnesses. It is not that at all. You are to judge of the character of each witness. You are to determine what weight should be attached to any one witness's testimony. You have seen the witnesses upon stand that have testified here. You have heard the depositions of others read. You are to judge of the weight to attach to every witness's testimony. You have seen their appearance, the evidence of candor or lack of candor shown; the interest manifested by them or their disinterestedness, as the case may be; and you are out of all to determine how much weight shall be attached, and determine upon the whole volume of the testimony, and the whole facts submitted to you, where the truth of the matter lies; and determine out of it all whether the plaintiff has established by the proof the claims here made.

As to preponderance see Whittaker's Code of Ev., sec. 148.

No Degrees of Preponderance.—There are no degrees of preponderance; hence language should not be used which would lead the jury to conclude that there were degrees, or that the evidence must be of a clear and convincing character. Therefore, to instruct the jury that there must be *clear* or a *fair* preponderance, would be error. *Russell v. Russell*, 6 O. C. C. 294; *Effinger v. State*, 9 O. C. C. 376.

It means greater weight, not larger number of witnesses. *Holmes v. Holland*, 29 W. L. B. 115.

It is not necessary to repeat the statement that a preponderance of evidence is required to justify a verdict, with every reference to the evidence made. *Reipe v. Elting*, 26 L. R. A. 769, 89 1a. 82.

Sec. 1726. Evidence and testimony distinguished—Weight of evidence may be shown by greater or less number of witnesses, as the jury may view it—Weight may be shown by circumstances or inferences—Credibility to be decided before weight to be determined.

The greater weight of the evidence does not necessarily depend upon the greater number of witnesses. It may, if the jury so view it, or it may not depend upon the greater number of witnesses if the jury, after sifting the credibility of witnesses, come to the conclusion that one or two or any less than the greater number of them told the truth.

The jury must bear in mind that testimony is that which is given by the witness when he is on the witness stand. It may not become evidence because the jury may believe that it is not entitled to any consideration and will discard part of it or all of it, just as you men deem proper in the exercise of your conscientious judgment. You must always consider the question of credibility first when there is a sharp conflict as there is here, between two men. You will have to decide which is worthy of belief, because they both can not be telling the truth. One of them must be mistaken. But the greater weight of the evidence may be made to appear other than by the mere statements of witnesses as by circumstances and inferences. In any transaction like this there may be inferences to be drawn from the facts and circumstances. There may be inferences to be drawn from the statements made by the witnesses, and that becomes just as much evidence to be considered by the jury as are direct statements of the witnesses themselves. So that in determining on which side the weight is, the jury are warranted in not only taking the statements made by the witnesses themselves, but

it may consider the facts and circumstances, and the natural, logical deductions that may be drawn therefrom.

Sec. 1727. Declarations, statements or admissions—How considered—Civil cases.

Declarations and statements (or admissions) of persons or of a party to an action should always be received by the triers of a cause with care and caution, for the reason that the parties may not have been understood at the time the statements were made; that the parties who now repeat them did not fully understand them, and the possibility that they were not recollected and repeated correctly in court.

But if you find that the declarations and statements have been made and correctly given in evidence, they afford very strong and convincing evidence and proof, for the reason that parties are not supposed to make declarations against themselves and interest. When it appears that they were understandingly and deliberately made, it often affords satisfactory evidence; yet, as a general rule, statements of the witness as to the verbal admissions of a party should be received by the jury with great caution, as that kind of evidence is subject to much imperfection and mistake. The party himself may not have clearly expressed his meaning, or the witnesses may have misunderstood him, and it frequently happens that the witnesses by unintentionally altering a few of the expressions really used, give effect to the statement completely at variance with what the party did actually say. But it is the province of the jury to weigh such evidence and to give it such consideration to which it is entitled in view of all the other evidence in the case.¹

¹ Declaration against interest competent evidence. Whittaker's Code Ev., sec. 17; 1 Greenleaf Ev. sec. 171.

Sec. 1728. Declarations against interest in criminal case.

On the part of the state it is claimed that there is evidence in the case tending to show that the defendant at various times, and to various persons who were before you as witnesses, made

statements or admissions against his interest, and which tended to show his guilt. The statements and declarations made by the defendant and offered in evidence against him, should be carefully examined and considered by you. These statements have been offered by the state, but the exculpatory parts thereof, or parts thereof in his justification, as well as those which import guilt are to be received and considered by you. You should consider the entire statements or declarations, and in the light of all the testimony in the case give to such statements and declarations the weight which in your judgments the same are justly entitled to receive.

A considerable portion of the evidence consists of testimony tending to show conversations in which the prisoner and others are said to have participated. No class of testimony is more unreliable and a more frequent cause of error in the courts of justice than the narration of conversations real or pretended.

The meaning or intention of the person in the conversation often depends upon gestures, mode of expression, or peculiar circumstances, known perhaps but to a few present. A conversation may not be fully heard; it may be imperfectly recollected, or inaccurately repeated, when the omission or addition of a word, or the substitution of the language of the witnesses, under color of bias or excitement, or the words actually used might change the sense of the conversation. This is apparent from the contradiction daily manifested in the courts of justice in the narration of the same conversation from the mouths of different persons. In considering this class of testimony, you should view it with deliberate care and scrutiny. In this connection, however, I will say to you that where a statement or admission is deliberately and voluntarily made by the admission or statement there made, is carefully remembered and accurately detailed, such declarations or statements made against interest may be of the most satisfactory nature.¹

¹ Wm. R. Day, J., in *State v. Webster*, Trumbull Co. Com. Pl. Conduct and sayings of party accused admitted not as confession, but as source of information respecting the **guilt or innocence** of defendant. Whittaker's Ev. p. 125.

Sec. 1729. Inferences drawn from conduct of parties and omission to produce evidence.

In determining the questions involved in this case, you are at liberty to look to the conduct of the parties, and if you find from a consideration of all the evidence that a party has omitted to produce evidence in elucidation of the subject matter in dispute which is within his power, and which rests peculiarly within his knowledge, you may draw such conclusions from it as in your judgment such omission warrants; while it is not a presumption of law that such omission to produce evidence renders it probable that the party withholding it does so because he knows that if it were produced it would operate to his prejudice, yet the law permits you to draw such conclusions or inferences, and to give to it such weight as your judgment may warrant.¹

¹ Newby, J., in *Graham v. Graham*, Highland Co., Com. Pl. "The ordinary presumption where a party fails to offer proof of what he ought to prove, if it exists, is that the question was not asked because the answer would have been unfavorable." Whittaker's Code of Ev. p. 502.

Sec. 1730. Credibility of witnesses.

In determining the credibility of the witnesses you may consider their intelligence, their ability to relate what they saw or heard, and the circumstances by which each of them was surrounded. You may also consider their manner on the witness-stand while testifying. Did they show a zeal in testifying against or for either side? Did they exhibit a reluctance to testify for or against either side? You may also consider whether each witness was corroborated or contradicted by other witnesses in the case of close credibility. You must pass upon the amount of credit you will attach to every fact. That requires you to look at the testimony of each witness in its own and in the light of the other facts. You may consider the relation that each witness bears to the case and the interest which he has in the result. If any one of them is to be affected seriously by the result of the case, by your verdict, then in fixing on the weight of his testimony you should consider that fact. Some of the

witnesses may have an interest in the conviction of the defendant. The defendant may have an interest in his liberty. Next to his interest in this life is his interest in his liberty. That is human and applicable to all of us. Your verdict may affect this interest of the state's witnesses in conviction, and it may affect the defendant's interest in his liberty. Witnesses have been known to testify falsely by such interests as I have just explained, and it is for you to say whether any of the witnesses for the state or the defendant have been moved to testify falsely by reason of such interest. In determining the weight to be attached to each and every witness' evidence, you may also consider the probability or improbability of the truth of the statements which they made. You are not obliged to believe the statements of any witness merely because he made them; and you may, if your judgment dictates, believe part and disbelieve part of any witness' testimony.¹

¹ Pugh, J., in *State v. Abbott*, Franklin Co. Com. Pleas.

Credibility is a matter of induction, to be determined by the jury, under such instructions, as to the reason of the case, as may be given by the court. Wharton's Cr. Ev., sec. 384.

Interest.—No person is disqualified as a witness by reason of interest. Whittaker's Ev., sec. 205. Relationship, party sympathy, personal affection influence the perceptive powers as effectively as pecuniary interest. Wharton's Cr. Ev., sec. 376. Interest and sympathy may always be shown. *Id.* secs. 376-476-7, 488.

Credibility depends on capacity to observe and capacity to narrate. Wharton's Cr. Ev., sec. 377.

Sec. 1731. Impeachment of witness—What constitutes reputation.

A person's reputation for truth is established by what his neighbors, and the persons with whom he generally associates in a community, generally say of him in this regard, or from the fact that nothing is said of and concerning him. If they generally say he is untruthful, that makes his general reputation for truth bad. On the other hand, if a man's neighbors and associates in a community say nothing whatever about him as to his truthfulness, that fact of itself is evidence that his general

reputation for truth is good. (Sacket, sec. 373; 28 Ind., 206; 68 Ind., 238; 132 Ind., 254.)

The reputation of a person for truth must appear to be general in a community where he lives, or in a community where he may temporarily reside for a sufficient length of time to acquire a general reputation. The general reputation must appear from what people in general say of him, in the community, and should not be limited to a particular class of persons, but depends upon what is generally said of him, or by the fact that people generally do not discredit him.

Whether or not the general reputation of these witnesses has been successfully impeached is for the jury to determine. You will consider all the testimony offered on this point, that produced by the defense to impeach, and that produced by the state to support the witnesses. The credibility of all these witnesses and the weight to be attached to their testimony is within the exclusive province of the jury. You may consider the standing of the witnesses offered, their opportunity to know the people with whom the witnesses sought to be impeached generally mingle in the community where they live; whether the testimony shows that the people with whom the witnesses associated generally discredit the witnesses for truth, or whether only a few of such persons discredit them; or whether it appears that the reputation of such witnesses for truth was not generally questioned.

The jury may also consider the relation which the impeaching witnesses sustain to the prosecution or the defense, or to the defendant, or to the witnesses sought to be impeached.

The jury may consider also the interest which the impeaching witnesses may have in the defense of this case or other alleged acts of solicitation of bribes testified to in this case, if the jury believe any witness or witnesses have such interest.

If the jury should be of the opinion that the general reputation of either or both of the witnesses mentioned for truth and veracity in the community where they live, or temporarily reside, has been successfully impeached, then you may in your discre-

tion disregard their testimony as being unworthy of belief, either a part of it or all of it, as your judgment demands. But, notwithstanding the fact that you may believe from the evidence that the general reputation of such witness or witnesses for truth has been successfully impeached, you may still believe their testimony, a part, or all of it, if your judgment suggests that you should give credence to it. In determining the weight to be given to the testimony of the witnesses sought to be impeached, you may consider whether it has or has not been corroborated by other witnesses or facts and circumstances appearing in the case.

To warrant the jury in coming to the conclusion that the reputation of such witness or witnesses has been successfully impeached, you must find that the bad reputation is general in the community where he lives; or that it is generally bad in a community where he has temporarily resided for a sufficient length of time to have acquired a general reputation for truth; that is, that it is generally so reported and considered to be bad in the community; and if it has not been thus impeached the jury should not reject it, but should give it consideration and weight, applying to it the ordinary tests of credibility.

Whether a witness has been successfully impeached, or how far the value of his testimony has been impaired by impeaching evidence is within the exclusive province of the jury. Notwithstanding you may believe the reputation of a witness for truth is not good, you may nevertheless give such weight to his testimony in this case as you may believe it to be entitled, or you may disregard it entirely if you believe it entitled to no weight.

You are not bound to take the testimony of any witness as absolutely true, and you should not do so if you believe his testimony is untrue or unreliable. The effect of impeaching testimony goes to the weight that should be given to that of the witness whose reputation is attacked. It is submitted to you to better enable you to determine in what light to estimate his testimony.

A witness may be impeached by showing that he has made other and different statements out of court from those made before you on the trial, as to any material matter. And if the jury believe from the evidence that any witness has made statements at another time and place at variance with his evidence in this case, regarding any material matter testified to by him, then it is the province of the jury to determine to what extent this fact tends to impeach, either his memory or his credibility, or detracts from the weight to be given his testimony. It is entirely a question for the jury as to what effect it will have upon you here. It is not whether the statement alleged to have been made outside is true, but whether the testimony given on trial is true. In determining the question you will take into consideration all of the facts and circumstances, applying the tests in determining the credibility of witnesses. The contradiction must be as to a material matter; and its materiality is to be measured by you by the charge of solicitation of a bribe, contained in the indictment. The question of fact which you are to determine in this case is whether the defendant corruptly solicited a bribe, with intent to influence his official duty.

¹ *State v. Nye*, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1732. Credibility of witnesses—Jury to consider physical conditions, possibilities or impossibilities.

The jury in passing upon the credibility of witnesses and the weight of the evidence, in reaching its conclusion may if it sees fit and deems proper “appreciate that the manner of an occurrence as testified to from the mouths of witnesses is not necessarily to be taken as matter of fact even if not in like manner contradicted. The jury may consider physical conditions, and possibilities or impossibilities and give the same such weight and effect in comparison with the vocal utterances of any witness, or any number of witnesses. It may consider the fact that witnesses may falsify, while physical situations and conditions may not.”¹

¹ *Hong v. Lumber Co.*, 144 Wis. 337, 129 N. W. 633, 140 Am. St. 1012.

Sec. 1733. Jury not at liberty to indulge in capricious disbelief of testimony.

When testimony is not of itself improbable, is not at variance with any proved or admitted facts, or with ordinary experience, and comes from witnesses whose candor there is no apparent ground for doubting, the jury is not at liberty to indulge in a capricious disbelief of the testimony of a witness.¹

¹ *Lonzer v. R. R. Co.*, 196 Pa. St. 610, 46 Atl. 937. If they do so, it is the duty of the court to set aside the verdict. *Id.*

Sec. 1734. Circumstantial evidence—Criminal cases.

In criminal cases the evidence may be either direct or circumstantial, or both; if a witness sees, knows and testifies to the commission of the ultimate fact to be proven, that is positive or direct evidence.

But it is not always possible in criminal cases to establish guilt by direct and positive testimony, nor is it necessary, and the law provides that circumstantial evidence alone, where sufficient to satisfy the mind beyond a reasonable doubt, shall justify conviction.

Circumstantial evidence is proof of facts standing or existing in such relation to the ultimate fact or facts to be proven that such ultimate fact may be inferred or deduced from such surrounding fact or facts. However, it must be remembered that before there can be any legal conviction of the defendant in this case, the evidence whether it be direct or circumstantial, or circumstantial alone, must be so clear and convincing as to exclude from your minds, and from the mind of each one of you, all reasonable doubt of the guilt of the defendant. Each and every circumstance and fact from which an inference is sought to be drawn against the defendant must be proven beyond the existence of a reasonable doubt before such inference can be drawn therefrom, and the hypothesis of guilt should flow naturally from the facts found and be consistent with them all.

Before any such inference can be drawn therefrom, and such fact relied upon as the basis of any legal inference against the

defendant, it must be strictly and indubitably connected with the main charge, to-wit: The killing of the deceased by the defendant. If the evidence in the case can be reconciled with the innocence of the accused, you should so reconcile it. It is not sufficient to entitle the jury to render a verdict of guilty that the facts and circumstances established by the proof coincide with, account, and therefore render probable, the hypothesis of guilt; but such proof must exclude to a moral certainty every reasonable hypothesis than that of guilt.¹

¹ Wm. R. Day, J., in *State v. Webster*. See Wharton's Cr. Ev., sec. 10; Wills on Cir. Ev. 188.

Sec. 1735. Same—Another form.

What is meant by circumstantial evidence in criminal cases is proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged; and if these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty. To authorize a conviction on circumstantial evidence alone the circumstances should not only be consistent with the prisoner's guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as leave no reasonable doubt in the minds of the jury of the defendant's guilt. Circumstantial evidence is legal and competent in criminal cases, and if it is of such character as to exclude every reasonable doubt, it is entitled to the same weight as direct testimony.

Sec. 1736. Circumstantial evidence—Continued.

Circumstantial evidence is often the most convincing.¹ It is difficult to fabricate the connected links in a chain of circumstances so as to preserve the semblance of truth. When the circumstances detailed are real and natural they will correspond

with each other. When they are inconsistent with each other or irreconcilable with the admitted or proven facts, then results a plain and almost certain inference that artifice has been resorted to and that the tale is not true.²

¹ "Circumstantial evidence is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud." *State v. Thorne*, 6 Law Rep. 54.

² *Gillmer, J.*, in *Hickox v. Ins. Co.*, *Trumbull Co. Com. Pleas.*

Sec. 1737. Negative and affirmative evidence.

Evidence has been offered tending to show that the bell was ringing, and evidence has been offered tending to show that the bell was not ringing at that time, and in considering the testimony upon this subject, you will consider it a rule of presumption in the law of evidence that, where witnesses are of equal credibility, the one who testifies to the affirmative is ordinarily to be preferred to the one who testifies to the negative, for the reason that the one who testifies to the negative may have forgotten. It is impossible to forget a thing that did happen. It is not possible to remember a thing that never happened.¹

¹ *Johnston, J.*, in *Youngstown St. R. R. Co. v. N. Y. L. E. & W. R. R. Co.* An instruction that the positive testimony of a witness to the existence of a certain thing, and the testimony of another witness that such a thing does not exist, are equally credible, is erroneous, as it ignores every well-settled principle which is applied in determining the credibility of witnesses, and lays down the rule that one witness will counterbalance another. *Smith v. M. B. & T. Ex.*, 30 L. R. A. 504.

An instruction that "positive testimony of a small number of witnesses that they saw or heard a given thing occur will outweigh the negative testimony of a greater number of witnesses that they did not see or hear it, provided the witnesses are equally credible; but in connection with this instruction should be considered the relative means or opportunity of the several witnesses to see or hear the occurrence, and it should be carefully kept in mind that it only applies when the witnesses are credible," is proper. *Draper v. Baker*, 61 Wis. 450.

Affirmative testimony is entitled to more weight than that which states that the witness did not see nor hear. *Toledo Con. St. Ry. v. Rohner*, 9 O. C. C. 702. See 2 O. 415, 426; T. (11), 43.

Sec. 1738. Weight given medical expert testimony as to personal injury.

As bearing upon the question of the plaintiff's injuries, both plaintiff and defendant have called medical experts to whom hypothetical questions have been put for the purpose of enlightening you upon the issue between the parties in that respect; that is, persons of experience in the medical profession have been called, to whom questions embodying certain statements as facts in the case have been put, and upon which statement of facts the witness has given his opinion. This is testimony which should be considered by you in determining this question between the parties, and the weight to be given to it depends upon the skill and experience of the physician, his learning, capacity, and upon whether or not the question and statement of fact contained in it, upon which the opinion is expressed, is a true statement of the facts as to the plaintiff's condition, as you find them to exist from the testimony in the case. If the question with this statement of fact put to the witness, upon which he expresses his opinion, does not embody the facts as you find them to have been established by the testimony, then the opinion is of no value in determining the issues in the case, because it is given upon what you find to have been a false premise. If, however, the questions embody substantially the facts as you find them to exist and from the testimony, then you should give to them such weight as in your judgment, in the light of all the testimony in the case they would be entitled to, in determining this question.¹

¹ *West v. Knoppenberger*, 4 C. C. (N.S.) 305.

Sec. 1739. Medical testimony as to nature of human blood.

Experts, both medical and those who have made the nature and properties of human blood a special study, were examined in regard to some matters in dispute between the state and the defendant. These experts were allowed to testify and give their opinions on account of the special skill and knowledge they had acquired from the study and practice in reference to the matters to which their testimony referred.

And notwithstanding their special skill and knowledge, you are to decide upon the value of the testimony and award to them, all and each of these experts, such weight as you may think their testimony deserves; the credibility of witnesses who have testified in this case, as well as the weight and effect of the circumstances are solely for your consideration and determination.

In weighing the testimony of witnesses, you should take into consideration the reasonableness and probability of the story they tell when on the witness-stand, their strength of memory, whether they are contradicted or sustained by any reliable testimony in the case, any interest which any witness may have, or feelings in the case, or any proper consideration developed by the proof, which may aid you in arriving at a just conclusion.¹

¹ William R. Day., in *State v. Webster*. See, as to identification of blood, Wharton's Cr. Ev., sec. 777a (8th Ed.).

Sec. 1740. Uncorroborated testimony of accomplice.

While there is no rule of law in this state preventing the jury from convicting upon uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with the greatest care and caution, subject it to the most careful examination in the light of all the other evidence in the case, and the jury ought not to convict on such testimony alone, unless a full and careful examination thereof has satisfied them beyond the existence of a reasonable doubt of its truth and that they can safely report upon it.¹

¹ Gillmer, J., in *State v. Champlin*. The conspiracy must be proved beyond a reasonable doubt. *Ditzler v. State*, 4 O. C. C. 551.

Corroboration.—The uncorroborated testimony of an accomplice may be sufficient to convict (10 O. S. 287), but is generally not entitled to much weight (19 O. 131, 135), and the court should caution the jury as to its unreliability. *Allen v. State*, 10 O. S. 287.

The jury may convict upon the uncorroborated testimony of an accomplice if it satisfies them beyond a reasonable doubt of the guilt. *Com. v. Scott*, 123 Mass. 222; *Com. v. Elliott*, 110 Mass. 104; *Com. v. Snow*, 11 Mass. 411.

Sec. 1741. Previous good character in criminal case.

The defendant relies upon his previous good character and some evidence has been introduced upon that point. That evidence you are to consider in the case precisely the same as the rest of the testimony. A defendant in a criminal case has the right to put in evidence concerning his former good character, his previous life. It is evidence tending to raise a probability that one who had such a character would not commit a crime. It is not, however, conclusive. It is simply evidence to be considered with all the other testimony for the purpose of determining whether the proof, taken as a whole, establishes his guilt beyond a reasonable doubt. If it does not, even this evidence may of itself create a reasonable doubt, and if it does, he is entitled to the benefit of that doubt. But if, when you come to take the evidence of character together with all the other testimony submitted for your consideration, and you are satisfied when you look at it and consider and weigh the effect upon your minds and judgment, if ultimately your minds are convinced beyond a reasonable doubt that the defendant is guilty, notwithstanding his standing and position in the community, notwithstanding his previous good character, he is guilty of the judgment of the law, it is your duty to so pronounce by your verdict.

It is a matter of common observation and experience that, owing to a latent weakness in the human character, men of the best standing, men whose lives have been characterized by long integrity and fidelity in all life's relations are found, on occasion when temptations are presented to them, to yield, to give way, and to fall into the commission of crime. It is temptation which subverts human character, destroys human integrity and uproots human fidelity, and under the influence of it—under the impulse of the occasion—men of that kind give way when it would be expected they would resist. There is no intimation in making this statement that the defendant has done this, but your attention is simply called to that weakness of the human character, which needs no proof, because it is common observation and experience, and you are instructed that it is proper for

you to consider it in giving the proper weight and effect to the evidence touching the previous character of the defendant.¹

¹ Pugh, J., in *State v. Abbott*, Franklin County Common Pleas. Character may be shown. 11 O. S. 114. Its bearing is for jury. 22 O. S. 477. It is error, however, to charge that it is entitled to less weight where the question is one of great criminality. 19 O. S. 264. See full discussion Wharton's Cr. Ev., sec. 57, *et seq.*

Reasonable Effect of Good Reputation—A Short Charge.—Testimony has been offered and permitted to be given to you as to the general reputation of the defendant for honesty. "The reasonable effect of proof of good reputation is to raise the presumption that the accused was not likely to have committed the crime with which he is charged. The force of this presumption depends upon the strength of the opposing evidence to produce conviction of the truth of the charge." Good reputation is certainly no excuse for crime, and it is a circumstance bearing indirectly upon the guilt of the accused which the jury are to consider in ascertaining the truth of the charge. The evidence offered by the defendant of his good reputation for honesty is to go to the jury and be considered by them in connection with all the other facts and circumstances, and if they believe the defendant to be guilty they must so find notwithstanding his good reputation.

Nye, J., in *State v. Wideman*, Medina Co. Com. Pleas.

Sec. 1742. Conduct importing guilt.

It is claimed on the part of the state that there is evidence before you tending to show conduct on the part of the defendant importing guilt.

The conduct and statements of the defendant at and after the time of his arrest should be fairly considered by you, and such allowance by you as is reasonably just, considering the surrounding circumstances under which the defendant was placed, and the liability of the witnesses to pervert or understand such conduct and statements.¹

¹ Wm. R. Day, J., in *State v. Webster*, Trumbull Co. Com Pl. Confessions may be by *acts* as well as by *words*. Acts of a prisoner in hiding stolen property, and in flight, and the conduct of an accused when informed of the accusation. *People v. McKee*, 36 N. Y. 113; *Jewett v. Banning*, 21 N. Y. 27; *Com. v. McPike*, 3 Cush. 181. Confusion, embarrassment, "blushing," and "terror," may be shown against accused. Wharton's Cr. Ev., sec. 751 and cases cited. In a note this quotation appears from a charge by Judge Learned: "I do not

think much reliance is to be placed upon the manner of any man when he is suspected or accused of crime. I mean whether he looks pale or flushed, or the like, for it is impossible for us to tell how a man may act when he is accused of crime. Our own judgment in that is not very reliable; one of you may appear to me flushed or frightened, and to another not so. Therefore I do not think much reliance is to be placed upon the opinion of witnesses as to manner. I don't speak of conduct, but as to manner." *Id.* See *Russell v. State*, 53 Mass. 367.

Sec. 1743. Testimony as to recognition of accused.

In considering the testimony of witnesses as to the recognition of the defendant on the night of the alleged homicide, you are permitted to take into consideration and consult your own knowledge and experience, as to the certainty or want of certainty with which the question of identity may be determined, and in determining the value of the testimony of the witnesses as to a recognition of the defendant, you should examine into the facts upon which such witnesses base their testimony. You should inquire what were the opportunities which such witnesses had of knowing and recognizing the defendant; what means the witness had of seeing and knowing the countenance and person of the defendant; the previous acquaintance which such witness had with the defendant; whether such acquaintance was casual or otherwise, and whether the witness was, at the time of the alleged recognition dispassionate, collected, observant, or otherwise. Familiarity with the person sought to be identified, though not essential to competency, may be of much importance in determining the weight to be given to the testimony of the witnesses testifying to the identity of another.¹

¹ Wm. R. Day, J., in *State v. Webster*.

Sec. 1744. Flight of accused.

The flight of a person immediately after a crime is committed with which he is charged is a circumstance in establishing his guilt, not sufficient of itself to establish his guilt, but a circumstance which the jury may consider in determining the probabilities for or against him, the probability of his guilt or inno-

cence. The weight to which that circumstance is entitled is a matter for the jury to determine in connection with all the other facts and circumstances called out in evidence on the trial of this case.¹

¹ Nye, J., in *State v. Dedrick*, Loraine Co. Com. Pleas. This substantially follows an instruction approved in *People v. Forsythe*, 65 Cal. 102. Flight of accused in the absence of a good motive is competent evidence. It is not necessary to show that the flight was on account of the charge. *State v. Frederick*, 69 Me. 400. Flight raises a presumption of guilt. *State v. Gee*, 85 Mo. 647; *State v. Brooks*, 92 Mo. 542.

Abbott, J., in *Donnall's Case* (Trial of Robert Saule Donnall, London, 1877), charged the jury that, "a person, however conscious of innocence, might not have the courage to stand a trial; but might, although innocent, think it necessary to consult his safety by flight." *Kennedy v. Com.*, 14 Bush, 341, is an authority against admission of explanatory matters as to flight, but the accused may certainly explain.

Sec. 1745. Consideration of improper unanswered questions by jury.

Gentlemen of the jury, some questions have been asked of witnesses which were not permitted to be answered by them. The fact that questions have been asked should not be considered by you, except as they have been permitted to be answered by the witnesses. You should determine the case and the facts necessary to be proved to establish the guilt of the defendant from the evidence which has been permitted to be given to you and not thereafter excluded from your consideration.

Sec. 1746. Conflict in testimony.

When there is conflict between witnesses in their testimony, the rule for guidance of the jury is that preference should be given to that witness who has the least inducement from interest or other motive to testify falsely. Again, in determining which of the witnesses are worthy of credit, you should consider whether each statement is probable or improbable. You are not obliged to believe the statement or statements of any witness who testifies before you merely because the witness made

such statement or statements. You have a right, in the exercise of your intelligence and in the light of your experience, to consider whether the statement or statements accord with the probability of truth. And, again, in passing on the credit of the witness, you should consider whether any of the witnesses have been impeached.¹

¹ Pugh, J., in *State v. Abbott, et al.*, Franklin Co. Com. Pleas.

Sec. 1747. Reasonable doubt.

A reasonable doubt is an honest uncertainty existing in the minds of a candid, impartial, diligent jury, after a full and careful consideration of all the testimony, with an eye single to the ascertainment of the truth, irrespective of the consequences of their finding. It is not a mere speculative doubt, voluntarily excited in the mind in order to avoid the rendition of a disagreeable verdict. Such a doubt is considered by the law as merely captious, and as an unreasonable one.

To acquit upon trivial suppositions and remote conjectures is, says an eminent jurist, a virtual violation of the juror's oath and an offense of great magnitude against the interests of society—directly tending to the disregard of the obligation of a judicial oath, the hindrance and disparagement of justice and the encouragement of malefactors. On the other hand, the jury ought not to condemn, unless the evidence removes from his mind all reasonable doubt as to the guilt of the accused, and he would venture to act upon it in a matter of the highest concern and importance to his own interests.¹

A reasonable doubt "is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they can not say they feel an abiding conviction to a moral certainty of the truth of the charge."²

"A verdict of guilty can never be returned without convincing evidence. The law is too humane to demand a conviction while a rational doubt remains in the minds of the jury. You will be justified and are required to consider a reasonable doubt

as existing if the material facts, without which guilt can not be established, may fairly be reconciled with innocence. In human affairs absolute certainty is not always attainable. From the nature of things reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt, and satisfies the mind to a reasonable certainty, a mere captious or ingenious artificial doubt is of no avail. You will look, then, to all the evidence, and if that satisfies you of the defendant's guilt, you must say so. If you are not fully satisfied, but find only that there are strong probabilities of guilt, your only safe course is to acquit.'"³

¹ Judge Minshall, in the Giddings Trial.

² Approved in *Morgan v. State*, 48 O. S. 377, as given by C. J. Shaw in Webster case.

³ By Judge Birchard in *Clark v. State*, 12 Ohio, 495. Approved in *Morgan v. State*, 48 O. S. 377.

Sec. 1748. Drunkenness no excuse for crime—May be considered for what purpose.

“Drunkenness is no excuse for crime. Crime, when all of the acts of the hand and mind which constitute it actually exist, is not the less criminal when committed by a person intoxicated. Yet, nevertheless, when purpose, premeditation, and deliberation are necessary ingredients of the crime, as in murder in the first degree, evidence of intoxication is admissible, and proper to be taken into consideration by the jury, to determine the question as to the intent, and premeditation and deliberation. But drunkenness is a distinct and substantive fact, and when set up by the defendant as bearing upon these ingredients should be satisfactorily shown by testimony to have actually existed, and that it was not simulated or assumed, it must not be left to mere conjecture or assumption. Unless the drunkenness is shown to have been to such an extent as to destroy the reasoning faculties for the time, that is, that accused was so drunk that he did not know what he was about, it is not entitled to great weight.

* * * If the jury find * * * that the killing was done

while the defendant was drunk, and in a moment of passion,
* * * these are proper circumstances to be considered by
you in order to determine whether the killing is manslaughter
or not. * * * If the defendant was suffering from an attack
of the *delirium tremens*, or total deprivation of his mental fac-
ulties, * * * superinduced by intoxication, * * * this
exempts the defendant from responsibility for crime, like insan-
ity produced by any other cause.”¹

¹ Davis v. State, 25 O. S. 369. “Intoxication is no defense to a prosecu-
tion for crime; but in some cases evidence of intoxication is ad-
missible to show that no crime has been committed, or to show
the degree or grade of a crime; and in the prosecution for mal-
iciously shooting with intent to wound, evidence that the defendant
was so much intoxicated that he could not form or have such intent,
is admissible.” Cline v. State, 43 O. S. 332.

CHAPTER C.

FALSE CLAIMS—MAKING OUT AND PRESENTING TO PUBLIC OFFICERS.

SEC.

1749. False claim under Code, sec.
13105.

1750. Legal knowledge of a fact defined.

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1. The statute.

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3. Conspiracy.

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5. Proof of prior and subsequent similar acts.

6. Presumption of innocence.

7. Uncorroborated testimony of accomplice.

8. Circumstantial evidence.

Sec. 1749. False claim under Code sec. 13105.

A false claim may be defined as one that is untrue. For example, if a claim is made for more bricks than were furnished, or for more labor in excavation than was done, such a claim is a false claim.

The word fraudulent involves a somewhat different idea. A fraudulent claim against the city may be defined as a false claim “gotten up or contrived by some person or persons with intent to present it for ——— payment, and thus to defraud” the city. You will perceive from these definitions that a false claim has not as many elements as a fraudulent claim. A false claim is not a fraudulent claim: but a fraudulent claim is a false claim and something more added. That is, it is a false claim gotten up or contrived by some person or persons with the intention, with the purpose, to present it for payment, and thus to defraud the party against whom it is preferred.¹

¹ Pugh, J., in *State v. Abbott, et al.*, Franklin Co. Com. Pleas.

Sec. 1750. Legal knowledge of a fact defined.

The term legal knowledge is used because legal is not synonymous with knowledge as it is understood in common or ordinary talk among men. Mere negligence, or the absence of ordinary

business prudence, in the transaction of the business of constructing the sewer and in presenting the claims by the defendants, would not be equivalent to knowledge, it would not show that they had such knowledge, guilty knowledge. To warrant you in finding that the defendants, or either of them, knew that the claim was either false or fraudulent, you must be satisfied that they, or the ones against whom you so find, were aware of such facts or circumstances in relation to the claim, as would have created the belief in the mind of an ordinarily prudent and intelligent person that the claim was, in some respect, false or fraudulent.

“In criminal as well as in civil affairs, every man is presumed to know everything that he can learn upon inquiry, when he has facts in his possession which suggest the inquiry.”

It is not true that a person is not chargeable with any more knowledge than he chooses to have; he is not permitted to close his eyes and ears, when he pleases, upon all sources of information, and then excuse his ignorance by saying that he did not, or does not, see or hear anything.

Making a still further application of this law to this case, if you find, from the evidence, that either or all of the defendants had knowledge or information of facts or circumstances in relation to this claim, which were sufficient to put an ordinarily prudent person upon inquiry, and which were of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly have led to the discovery that the claim was, in any respect, in any particular, false or fraudulent, then you may presume that he or they, as the case may be, knew the claim was thus false or fraudulent. That state of facts, if proved, may have the same force and effect as if it had been proved that he or they had actual knowledge of the false or fraudulent character of the claim.¹

¹ Pugh, J., in *State v. Abbott*, Franklin Co. Com. Pleas.

Sec. 1751. Intent—Proof of.

There can be no crime where there is no criminal intent. An act does not make the actor guilty unless his intent was criminal.

This wise, just, and reasonable rule is firmly settled in the whole of the land, is widely known and approved among men, and is recognized and observed in every enlightened system of jurisprudence. When an act forbidden by law is proved to have been knowingly done, no further proof is needed on the part of the state to obtain a conviction in the absence of justifying or excusing facts, since the law in such a case *prima facie* presumes the criminal intent. It is not a conclusive presumption which shuts out explanation and justification on the part of the defense. The law infers the intent from the act and its character. Although the act forbidden by law was knowingly done, yet, if it was not done with a bad purpose, the defendant may rebut the *prima facie* presumption by showing that the act was done from a pure motive. Therefore, in this case, if the state has convinced you, to the exclusion of all reasonable doubt, that the defendants presented a false or fraudulent claim for payment to the director of accounts, knowing it to be false or fraudulent, the intent to cheat and defraud would be *prima facie* presumed against such of the defendants as did that, and the state was not required to offer proof to show intent.

But if the facts and circumstances preceding the act, or contemporaneous with and being part of the transaction itself, as disclosed by the evidence, showed that the claim was presented from a pure motive, that is rebuttal of the presumption of intent. The *prima facie* case made by the state in such an instance and in that way does not take away the presumption of innocence from the defendant, or deprive him of a reasonable doubt in the minds of the jury. The indictment charges only an intent to defraud. It is not necessary, therefore, that the state should have proved that the city had been actually defrauded. If you are convinced that the defendant knew the false or fraudulent character of the claim when it was presented, you are not obliged to look further than that to find the intent to cheat and to defraud on the part of the defendant.¹

¹ Pugh, J., in *State v. Abbott, et al.*, Franklin county. 'Indictment for presenting false vouchers. This may be so framed to meet any case upon the question of intent.

Sec. 1752. False claim, bill or account—Presented by state officer.

1. *The statute.*
2. *The indictment.*
3. *Conspiracy.*
4. *Weight of evidence and credibility.*
5. *Proof of prior and similar acts.*
6. *Presumption of innocence.*
7. *Uncorroborated testimony of accomplice.*
8. *Circumstantial evidence.*

1. *The statute.* It is provided by statute, gentlemen of the jury, that whoever, knowing the same to be false or fraudulent, makes out or presents for payment, or certifies as correct to the auditor of state, any claim, bill, account, or other evidence of indebtedness, which is false or fraudulent in whole or in part for the purpose of procuring the allowance of the same or an order for the payment thereof out of the treasury of the state, and whoever, knowing the same to be false and fraudulent, receives payment of any such claim, account or other evidence of indebtedness from the treasurer of state, shall, if such evidence of indebtedness so made out and presented or so certified or on which payment is received is false or fraudulent to the amount of \$——— or more, he shall be imprisoned in the penitentiary not more than ten years or less than one year, etc.

2. *The indictment.* The indictment in this case charges the defendant with having done three of the things, each of which is forbidden by this statute, and so charges in three counts.

This indictment goes with you to your jury room and it has been so thoroughly threshed out and explained to you in detail during this case that I consider no further explanation of it necessary here.

3. *Conspiracy.* In this case evidence has been adduced by the state for the purpose of establishing a conspiracy between the defendant, S. and B. The acts of B. in this case can not be charged to the defendant, S., nor is he responsible therefor

unless the state has, to the degree of proof I have heretofore stated, proven to you that there was an agreement between S. and B. to the effect that they would do the things as charged in either one, two or all the three counts of this indictment.

A conspiracy exists, gentlemen of the jury, where two or more persons agree to do an unlawful thing. This agreement need not be in writing. It need not be by expressed words necessarily. It is sufficient if there is a common understanding between them, either express or tacit, to the effect that they would do the unlawful thing. But this conspiracy, gentlemen of the jury, can not be proven by the declarations or acts of one conspirator which are made outside of court and not under oath. If the conspiracy has been proven, then the act, as well as the declarations, of each one will become and are in law the acts of the other, provided such acts or declarations are done or made in furtherance of the common plan and before the completion of the conspiracy. That is to say, during the existence of it. Therefore, in this case, gentlemen of the jury, if you should find from the evidence that B. and the defendant, S., had agreed to make out a false and fraudulent voucher which they knew to be false and fraudulent, for the purpose of having it presented to the state auditor to obtain a warrant on the treasurer for it, it would make no difference who goes to the state auditor to get the warrant nor who draws the money. Both would be guilty. And that same doctrine applies to any acts with reference to such conspiracy and in carrying them out.

4. *Weight of evidence and credibility.* With reference to the weight of the evidence, I say to you, gentlemen of the jury, that you are the sole judges of the credibility of the witnesses and of the weight to be given their testimony. That function belongs to you, and not to the court, and this court can not tell you, and is not permitted by law to tell you, what you shall believe and what you shall not believe, or what degree of credence or credibility you shall attribute or attach to any evidence or to any witness' testimony. It is your province, therefore, to determine exclusively the weight which shall be attached to

any witness' testimony, and you may, therefore, believe all that a witness says; you may believe a part of it; or you may believe none of it. You may, in your discretion, require no corroboration of a witness; you may require little corroboration; you may require much corroboration. If the evidence altogether considered convinces you beyond a reasonable doubt of the truth of the charges made in any one or more of the counts of this indictment, that is sufficient for a conviction. If it fails to so convince you, you must acquit.

5. *Proof of prior and subsequent similar acts.* In this case, gentlemen, there has been introduced evidence of prior and subsequent similar acts to those charged in this indictment. It is a well settled principle of law that prior or subsequent wrongful acts, although crimes, are not evidence tending directly to establish the crime for which the defendant is on trial. In other words, evidence that the defendant may have committed a crime similar to this at a prior date or at a subsequent date is not received for the purpose of showing that he must have committed this crime. That is not the law. In certain kinds of cases where it is necessary for the state to prove a plan or motive, evidence of prior and subsequent similar transactions is admitted for the sole purpose of proving a plan, motive or intent in the case on trial, and for the purpose of negating any innocent intent or plan which might be drawn from the evidence of the single plan alone. If the state has so proven the charges of any one or more of the counts, the failure of the commissioners of public printing to approve the vouchers is not a defense.

6. *Presumption of innocence.* By the plea of not guilty in this case, the defendant not only denies every material allegation and averment of the indictment presented against him, but he stands clothed with the legal presumption of innocence, and this presumption remains with him in the examination and consideration of every fact and proposition necessary to be established on the part of the state. This presumption is not a mere matter of form, but it is a real protection with which the law

shields him and to be overcome by that measure of proof which convinces your mind of his guilt beyond the existence of a reasonable doubt. This indictment itself creates no presumption of guilt. It is not to be considered by you as furnishing any evidence against the accused, and it justifies no unfavorable inference on your part against him. The guilt or innocence of any defendant is to be determined upon the evidence submitted, upon the trial; and as I have said, the presumption of innocence follows and goes with the defendant through the trial and remains until overcome and overthrown by proof of guilt sufficient to exclude every reasonable doubt.

7. *Uncorroborated testimony of accomplice.* While it is a rule of law that a person accused of crime may be convicted upon the uncorroborated testimony of an accomplice, still you ought not to convict upon the uncorroborated testimony of an accomplice alone, unless, after careful examination of such testimony, the jury is convinced beyond a reasonable doubt of the guilt of the defendant. You are, however, in this case as in every other case, to look to, weigh and consider all of the evidence. What is meant by corroboration in this connection is evidence other than the accomplice's testimony.

In regard to the character, scope and sufficiency of the testimony and evidence corroborating an accomplice's testimony, the court charges you that it is not essential that such corroborative evidence shall cover every material point testified to by the accomplice to warrant a verdict of guilty against the defendant on trial. You as sole judges of the credibility of the witnesses and of the testimony and evidence submitted to you, will determine to what extent, if any, you require corroboration in order to believe the testimony of an accomplice to be true, and the amount and extent of corroboration, whether little or great, is for you to determine. You will, therefore, look to and consider the other evidence adduced at the trial, as well as the testimony of the accomplice, and determine to what extent, if at all, it establishes the commission of the offense charged in the indictment, and the defendant's connection therewith.

8. *Circumstantial evidence.* In this case the state is relying upon circumstantial as well as direct evidence to support the charge made in the indictment. Circumstantial evidence is proof of a series of facts other than the facts in issue, which by experience have been found so associated with that fact, that in the relation of cause and effect, they lead to a certain and satisfactory conclusion. In order that the defendant's guilt shall be proved beyond a reasonable doubt, it is not essential that each circumstance should be proved beyond a reasonable doubt, unless such circumstance is a necessary link in a chain of circumstances, which chain of circumstances is necessary to a conviction. A person may be properly convicted by a large number of circumstances, no one of which, alone, is established beyond a reasonable doubt.¹

¹ State v. Slater, Franklin County, Dillon, J.

CHAPTER CI.

FALSE IMPRISONMENT.

SEC.

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1755. Different form of definition—Detention while under investigation at police station.
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 4. When arrest may be made for misdemeanor.

Sec. 1753. False imprisonment defined.

False imprisonment is the unlawful arrest and detention of the person of another, with or without a warrant or other process.

It consists in an unlawful restraint upon a man's person, or control over the freedom of his movements, by force or threats; and every restraint or confinement is unlawful where it is not authorized by law.

The actual detention of a person, and the unlawfulness thereof, constitute the trespass; the gravamen being the unlawfulness of the imprisonment or the detention.¹

¹ *Clark v. Smith*, 37 Utah, 116, 106 Pac. 653, Ann. Cas. 1912, B. 1366.

Sec. 1754. Another definition—Means of accomplishing detention or restraint other than by formal arrest.

False imprisonment is necessarily a wrongful interference with the personal liberty of an individual. The wrong may be committed by words alone, or by acts alone, or by both, and by merely operating on the will of the individual, or by personal violence.

It is not necessary that the individual be confined within a prison, or within walls; or that he be assaulted, or even touched. Nor is it necessary that the wrongful act be committed with malice, or ill will, or even with the slightest wrongful intention.

Nor is it necessary that the acts be under the color of any legal or judicial proceeding.

All that is necessary is that the individual be restrained of his liberty without any sufficient legal cause therefor, and by words or acts he fears to disregard.¹

¹ *Comer v. Knowles*, 17 Kan. 436; *Garnier v. Squires*, 62 Kan. 321; *Whitman v. Railway*, 85 Kan. 150, 116 Pac. 234; Ann. Cas. 1912 B. 722. In the latter case, where a passenger on railway train was detained by conductor to obtain statement, the court remarked that it found some difficulty in bringing the facts within the principles that apply to false arrest or imprisonment.

Sec. 1755. Different form of definition—Detention while under investigation at police station.

False imprisonment is an injury to the right of personal liberty. It consists in the total, or substantially total restraint of a person's freedom of locomotion.

Any general restraint is sufficient to constitute an instrument.

A person, however, can not be imprisoned who is not cognizant of any restraint, nor who is induced by false statements to go where he otherwise would not have gone.

A formal arrest may not be essential to a false imprisonment, as it may be committed by words alone, or by acts alone, or by both, or by merely operating on the will of the person.

It is not necessary that he should be confined within a prison, or within walls.

It is not essential that the act be committed with malice or ill will, or even with the slightest wrongful intention. Nor is it necessary that the act should be done under color of any legal proceeding. All that is essential is that the individual be restrained of his liberty without any sufficient legal cause therefor, by words or acts which he fears to disregard.¹

The imprisonment must be against the will of the party complaining; for if he goes willingly, or of his own accord, there is no detention.²

So, if upon suggestion to a person that he go to the office of the chief of police at the city prison to have an interview with the chief of police concerning an alleged criminal charge against him, he goes to such prison voluntarily, without compulsion, where he has such interview behind closed doors, but without any detention by words or force, there is no unlawful detention.

But a detention, even for a short time, in a room of the city prison or in the corridor where prisoners are usually taken, though not placed in a prison cell, but which was not intended being through the mistaken act of a subordinate police officer, is sufficient to constitute an unlawful detention, provided it was done without probable cause.

¹ Kinkead, Torts, sec. 212; *Comer v. Knowles*, 17 Kan. 441.

² Kinkad, Torts, sec. 214; *Floyd v. State*, 12 Ark. 43, 54 Ann. Dec. 250; *State v. Lunsford*, 81 N. C. 528.

Sec. 1756. Trespass to person—Elements—Definition.

Trespass to the person is an injury committed by one person upon another with violence actual or implied, known in law as false imprisonment. To constitute the injury there are two points. 1. The detention of the person, and, 2. The unlawfulness of such detention. Every confinement of the person is an imprisonment whether it be in a common prison or a private house, or even by forcibly detaining one in the street. Unlawful or false imprisonment consists in such confinement or detention without sufficient authority, which authority may arise from some process from the courts of justice, or from some special cause warranted from the necessity of the thing, such as the arrest of a felon by an officer or a private person without warrant.¹

¹ E. P. Evans, Judge, in *Sohn v. Patton*, Franklin Co. Com. Pleas. Cooley on Torts (2d Ed.), p. 195, *et seq.* Any deprivation of the liberty of another, without his consent, whether it be actual violence, threats or otherwise, constitutes an imprisonment within the meaning of the law.

Sec. 1757. Burden on plaintiff to prove unlawful restraint.

The burden is on the plaintiff to prove not only the fact of detention or imprisonment, but also that he was restrained or detained or imprisoned by the defendant, without a warrant, or other process, or by threats or force. This he may do by proof of facts or circumstances which give rise to the inference or presumption that the restraint or imprisonment was wrongful or unlawful.

But when plaintiff by his own evidence shows that he was detained or imprisoned as the result of judicial proceedings, and by the issuance and execution of a warrant, or other legal process issued thereon, the burden then is upon him to show something more than a mere detention or imprisonment. In

such case there is no presumption arising from the mere arrest and imprisonment, and it is therefore incumbent on plaintiff to prove that such arrest and imprisonment was unlawful.¹

¹ *Smith v. Clark*, 37 Utah, 116, 106 Pac. 653, 1912 B. 1366.

Sec. 1758. Arrest and imprisonment—What constitutes.

To constitute an arrest and imprisonment it is not necessary that the party making the arrest should actually use violence or force toward the party arrested, or that he should even touch his body.¹ If he professes to have authority to make the arrest, and he commands the person by virtue of such pretended authority to go with him, and the person obeys the order, and they walk together in the direction pointed out by the person claiming the right to make the arrest, this constitutes an arrest and imprisonment within the meaning of the law.

Any deprivation of the liberty of another without his consent whether it be by actual violence, threats, or otherwise constitutes an imprisonment within the meaning of the law.²

¹ *Cooley on Torts*, 169; *Addison on Torts*, sec. 799.

² *From Sohn v. Patton*, Franklin Co. Com. Pleas, E. P. Evans, Judge. Manual seizure is not necessary to constitute an arrest. *Hill v. Taylor*, 50 Mich. 549. "It is the fact of compulsory submission which brings a person into imprisonment." *Brushaber v. Sleghmann*, 22 Mich. 266. As to what constitutes imprisonment see *Cooley on Torts*, pp. 195-6.

Sec. 1759. Arrest by officer without warrant.

It is expressly provided by statute in Ohio (Code, sec. 13493) that when a felony has been committed, any person, whether an officer or a private person, may without warrant arrest another whom he believes, and has reasonable cause to believe, is guilty of the offense and may detain him until a legal warrant can be obtained, and the statute further provides that a sheriff, deputy-sheriff, constable, marshal, or deputy-marshal, watchman, or public officer shall arrest and detain any person found violating

any law of the state, or any legal ordinance of a city or village, until a legal warrant can be obtained.

¹ *Sohn v. Patton*, Franklin Co. Com. Pleas; Evans, Judge. See Cooley on Torts (2d Ed.), pp. 199, 201, 202, 203. A right of arrest exists where there are well-grounded suspicions of felony. *State v. West*, 3 O. S. 509. Where misdemeanor is committed within presence of officer he may arrest without warrant. *State v. Lewis*, 50 O. S. 179. Marshal's power to arrest without warrant. Code, secs. 1849, 7129; *Ballard v. State*, 43 O. S. 340.

Sec. 1760. Distinction between felonies and misdemeanors.

The distinction between felonies and misdemeanors in this state is this: Offenses which may be punished by death or imprisonment in the penitentiary are felonies; all other offenses are misdemeanors.¹

¹ *Sohn v. Patton*, Franklin Co. Com. Pleas, Evans, J.

Sec. 1761. Person arrested without warrant can not be held longer than is necessary to obtain warrant.

A person who has been arrested without a warrant can only be held for such reasonable time as may enable the person making the arrest to obtain a warrant. It is the duty of the person so making an arrest to take steps to secure a warrant within such reasonable time after such arrest as he may be able to obtain the same.

So, therefore, if the person be held in custody for any longer period than is reasonably necessary to obtain a legal warrant for his detention, he will have a right of action for false imprisonment against the officer or person who made the arrest, as well as against those by whom he has been so unlawfully held in custody. By the failure to procure the necessary warrant for the prisoner's detention, the imprisonment becomes unlawful from the beginning, and all concerned in it are equally liable.¹

¹ *Leger v. Warren*, 62 O. S. 500.

Sec. 1762. Arrest of witness without process.

There is no law in Ohio which authorizes an officer to arrest, without process, a witness and hold him until he gives bond.

If the plaintiff therefore was arrested and imprisoned as a witness only until he gave bond for his release, such arrest and imprisonment was unlawful, and is what the law denominates false imprisonment.¹

¹ Sohn v. Patton, Franklin Co. Com. Pleas, Evans, J.

Sec. 1763. Liability of several arresting officers.

If the jury find from the evidence that the plaintiff has been falsely imprisoned as alleged in his petition, and that he was thus falsely imprisoned by the joint acts of several wrong-doers, then such wrong-doers are jointly and severally liable for such joint act, and the plaintiff is under no obligation to sue all such wrong-doers, but he may at his election proceed against any one or more of them. If you shall find from the evidence that officers N. and B., and they alone, falsely arrested and imprisoned the plaintiff at the time in question, still if the evidence shall further show by a preponderance thereof that the defendant, E., was then present and acting in concert with the said N. and B., and was wrongfully inciting them to arrest or imprison the plaintiff, then the defendant, E., is equally liable with the said N. and B., and if N. and B. are guilty of falsely imprisoning the plaintiff, then the defendant, E., is equally guilty if he procured them to so imprison the plaintiff, or if he aided or abetted them in so doing. If you shall find from the evidence that officers N. and B., and they alone, arrested and imprisoned the plaintiff, and that the defendant, E., was present at the time of said arrest and imprisonment, still if you shall find that the said E. did not procure the plaintiff to be so arrested or imprisoned, or that he did not in any way aid, abet, or assist in the arrest and imprisonment, or advise or encourage it, then he is not guilty.¹

¹ Sohn v. Patton, Franklin Co. Com. Pleas, Evans, J. See Leger v. Warren, 62 O. S. 500.

Sec. 1764. Probable cause.

Probable cause is a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant

a reasonably prudent, cautious man in the belief that the person detained was guilty of the felony committed.

Now in considering the question of probable cause, in the event that you find that this detention was through and by the directions of the chief of police, you will look to all the circumstances, to all the evidence that you have heard in this case, notwithstanding the court has discharged certain defendants, but you may consider all that was said and done by all of these parties, the evidence relating to the burglary, the testimony of each and every person who has been on the witness stand, and determine in your best judgment whether or not there was reasonable ground of suspicion supported by circumstances sufficiently strong as to warrant a reasonably prudent, cautious man in the belief that the plaintiff was guilty of this crime of robbery. If you find that there was such reasonable ground of suspicion, then, of course, there would be probable cause, and it would be your duty to find a verdict in favor of the defendant. If, on the other hand, you believe and find by a preponderance of the evidence that there was not reasonable ground of suspicion and that the circumstances were not sufficient to warrant a reasonably prudent, cautious man in the belief that this plaintiff was guilty of the crime of robbery of the Davidson property, then there would be no probable cause and the detention, in the event that you find that Carter directed the detention, would be unlawful and the plaintiff would be entitled to your verdict.¹

¹ *Bogner v. Davidson*, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1765. Probable cause—Right of officers of police department to make investigation.

In considering the matter of reasonable or probable cause and determining that fact, you may take into consideration this proposition as to the law which I will give you:

For the protection of society and the prevention of crime, there has been established under the law in the city of Columbus, a department of Public Safety, containing a police department, having a chief of police, detectives and policemen. It is

their duty when a crime of felony has been committed to make an investigation and ferret out, if possible, the perpetrator or perpetrators of such felony so committed, and in making such investigation, if they find a reasonable ground of suspicion pointing to a certain individual or to certain individuals as the one or ones guilty of such crime, and such suspicion is supported by circumstances sufficiently strong to warrant a cautious man in his belief that such person or persons are guilty, then I charge you that it is within the right of the police department to cause such suspected person or persons to be brought before the chief of police and investigated and interrogated as to such crime, and no cause of action will lie therefor against such officials, if only an investigation is made, and there is no unlawful detention.

The jury may take into consideration all that was done by way of investigation, all of the knowledge that may have come home to the defendant in respect to this alleged offense, as reflecting on the question of probable cause.¹

¹ *Bogner v. Davidson*, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1766. Responsibility of chief of police if person brought in for investigation, under suspicion for a felony, but without formal arrest, where there is a formal detention by mistake.

Who was responsible for the detention of the plaintiff in this case? Was it the chief of police, or was it officer C., acting either from force of habit, or from a misunderstanding of the directions given by the chief, or was he acting under a specific order given him by the chief of police? If he was acting as claimed by the plaintiff in his evidence, under the directions of chief of police, then, of course, he was imprisoned through the direct orders of chief of police Carter.

The claim of the plaintiff is that the chief of police said "Take this man down stairs and lock him up." That is the precise language he uses in his testimony. The claim of the defendant, the chief of police, is "Take this man down in the corridor and let him wait until his wife comes."

Now upon that testimony you will determine whether or not the imprisonment was through the direction of chief of police, or whether it was not. If it was not under the specific order or direction of the chief of police, then, gentlemen of the jury, I charge you that if it was made by officer C., either through a misunderstanding or on his own responsibility, and if he was detained under those circumstances without the knowledge of chief of police, then the law will not hold the chief of police for that detention if it was unlawful unless or until the chief of police had knowledge of that detention.

The law places the responsibility upon the chief of police for the custody of all prisoners that are placed in the city prison. But the chief of police can not be responsible under any and all circumstances, and can only be responsible when he has a duty to perform or when he has knowledge brought to him in reference to or concerning the detention of prisoners.

Now if you determine under the instructions just given you that chief of police was not responsible, did not intend and did not know that the plaintiff was sent down stairs to be locked up and he did not have any knowledge that he was locked up, and had no opportunity to right the mistake, if it was a mistake, then there is not any responsibility on the part of the chief of police, the defendant. But if, on the other hand, you find from the evidence that the claim of the plaintiff is right, then I say to you that under such circumstances the detention would be unlawful, unless it was on a reasonable ground of suspicion.¹

¹ *Bogner v. Davidson*, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1767. Damages.

If you find that the defendant is guilty as charged in the petition, he is liable to the plaintiff for such damages as the law denominates compensatory, although he may have acted in good faith and in the honest belief that he was discharging his duty as an officer; but if you shall find that the defendant arrested and imprisoned the plaintiff maliciously, then the defendant is liable to the plaintiff for compensatory damages, and you may,

if you see proper, also assess further damages as smart money, that is, exemplary damages. The compensatory damages are allowed to compensate the plaintiff for the actual injury he has sustained. Exemplary damages are given as smart money in the way of pecuniary punishment. If you find for the plaintiff, you should allow him full compensatory damages, that is, such as will fully and reasonably compensate him for the injury he has sustained. The elements for which compensatory damages may be allowed include pain and suffering, if any, both mental and physical, the loss of time, if any, in consequence of such false imprisonment, and injury, if any, to the reputation or social position, as well as for shame and mortification caused by the false imprisonment; and also reasonable attorney's fees to the plaintiff for the services of the attorneys in the prosecution. And if you find that the defendant not only falsely, but that he also maliciously, imprisoned the plaintiff, then you may allow the plaintiff, in addition to compensatory damages, such further sum by way of exemplary damages as you in your judgment may think just and proper in view of all the evidence and circumstances.

But if you should find from the evidence that the defendant is guilty as charged, but that in making the arrest complained of, and in the detention of the plaintiff, the defendant acted in good faith and without malice, then such fact should be considered by the jury and the damages awarded should be confined to compensatory only. Exemplary damages should not be allowed against an officer who makes or causes an illegal arrest unless he acts in bad faith, or is guilty of some oppression or misconduct.¹

¹ *Sohn v. Patton*, Franklin Co. Com. Pleas, Evans, J.

Sec. 1768. False arrest and detention of guest at hotel supposed to be using room for immoral purposes.

1. *Statement of claims.*
2. *Arrest and detention.*
3. *Responsibility of hotel proprietor for arrest.*

4. *Claim of justification that wife of guest occupied room without right.*
5. *Did the proprietor participate in arrest?*
6. *Compensatory damages.*
7. *Exemplary damages.*

1. *Statement of claims.* The action is one for false arrest or imprisonment in which the plaintiff seeks to recover the sum of \$———. The burden of proof is on the plaintiff to show that the defendant in some way participated in, and jointly with the officer caused the arrest of the plaintiff, which is the sole question of fact submitted to the jury for determination. Where more than one person participates in causing an arrest, each and all are legally responsible for damages resulting if the arrest turns out to be unlawful.

It is alleged by plaintiff, and the undisputed evidence shows that plaintiff was arrested on —— by officer —— and taken in an automobile to the city prison, where he was examined by the chief of police and then discharged.

2. *Arrest and detention.* An arrest signifies the restraint of a man's person. Mere words are sufficient to constitute an arrest where the person submits against his will. Circumstances must be such as to indicate that the party is actually under restraint and within the power of the officer. In this case the plaintiff was told by the defendant that he would call an officer. Plaintiff knew that the officer was coming. The officer went to the room in the hotel which plaintiff occupied, and after some conversation, told the plaintiff he would have to go down before the chief of police. He went with the officer in the automobile to the city prison. To constitute false imprisonment it is not necessary that the person detained should be confined in a prison. The only essential is that the individual be restrained of his liberty without legal right therefor, the place being immaterial. The court is of the opinion and so finds as matter of mixed law and fact that there was such detention and restraint of the liberty of the plaintiff in this case as to constitute false

arrest and imprisonment, provided it was without legal cause or justification.

3. *Responsibility of hotel proprietor for arrest*—*Communication of facts by him to officer.* The next question then, is whether the defendant Y. is responsible for the arrest and detention if it was unlawful.

A private citizen does not have the right to make an arrest for a mere misdemeanor. A police officer may arrest and detain a person when found at the time of the arrest violating a law of this state, such violation constituting a misdemeanor. Besides the one actually making the arrest others may become liable for false imprisonment by indirectly participating therein. Officers may make arrests upon information furnished them by private citizens or at the instigation of private persons if a private citizen merely calls the attention of an officer to a supposed commission of a crime without other direction and the officer arrests the person on his own responsibility for what he assumes to be an offense committed in his presence, for a misdemeanor, the private citizen under such circumstances, who does nothing more than communicate the fact to the officer, does not render himself liable. Though a private citizen states to the officer what he knows of a supposed offense, or that parties are guilty of a supposed offense, even though he expresses the opinion that there is ground for arrest but without making any charge or requesting an arrest, does not thereby make himself liable for a resulting wrongful arrest.

The answer of the defendant alleges that he called an officer for the purpose of compelling the parties to leave the premises. An officer has no authority to do any such thing. He can only arrest when a party is in the act of committing a misdemeanor, such as trespassing upon the property. The jury will determine the fact whether the defendant was responsible for causing the arrest of plaintiff. In order to hold defendant for the arrest it is necessary that he shall have done something more than merely to inform the officer that he had a couple in the room that were not married. It is incumbent upon the plaintiff to

prove by a preponderance of the evidence that the defendant advised or requested, or in some manner participated with the officer in making or causing the arrest. If you find that defendant did nothing more than to state the facts to the officer, then you cannot find him responsible for the arrest. But if you find that he asked or requested the officer to make the arrest, or in some manner participated therein, then you must find him equally guilty with the officer for the arrest.

4. *Claim of justification that wife of guest occupied room without right.* The defendant seeks to justify the arrest on the ground that plaintiff was a guest in the hotel of defendant, having been assigned a room therein occupied by himself alone; that on the morning defendant having been advised that a woman had come into the room assigned plaintiff, went to the room and looking through the transom saw the plaintiff and the woman fully dressed having sexual intercourse; that he thereupon ordered said parties to vacate the room, which they refused to do; that he thereupon called an officer for the purpose of compelling the parties to leave the premises; that upon the appearance of the officer they still refused to go; that defendant at the time did not know the woman in the room was the wife of plaintiff; that she had not been registered as a guest of his hotel, or been invited or authorized by him to enter or make use of the room. This, gentlemen, the court states to you as matter of law under the facts in this case, is not a defense to plaintiff's cause of action, because the woman was the wife of the plaintiff.

A hotel keeper holds out his house as a public place to which travelers may resort, and of course, surrenders some of the rights which he would otherwise have over it. A hotel keeper sustaining his quasi public character is invested with many privileges and burdened with correspondingly great responsibility. Except as the common law is modified by statute, an inn keeper may conduct his inn as he deems best so long as he does not violate the rights of his guests. He may eject persons who are disorderly. But in this case the plaintiff had the right of occupancy of this room as a guest. His wife at the time of the arrest was not oc-

cupying the room in the sense and meaning of a guest, that is using and occupying it at night for sleeping purposes and during the whole of a day or a material part thereof; she was there as a visitor of her husband.

While a room in a hotel occupied by a guest is not in the full legal sense his dwelling house, still under proper limitations a proprietor may be bound to admit those who have business or other rightful or legal relations with a guest. This may be considered as derived from the rights of the traveler.

In this case it is conceded that plaintiff's wife was stopping at the hospital with a sick child, staying there at night; that plaintiff informed the clerk that his wife was coming and was told by the clerk to have her register. But it is clear that plaintiff on taking his wife into the room, did not state to those in charge that his wife was going into his room as a visitor. Without regard to whether that would be a prudent thing to do, it does not affect the legal rights and duties of the parties concerning the arrest of plaintiff in this case. The undisputed evidence as shown by the room cards is that the defendant charged and received one dollar for the occupancy of the room by the wife of plaintiff for two days. This constitutes in law a recognition of the relation of guest of the wife of plaintiff at the hotel during the two days involved.

5. *Did the proprietor participate in arrest.* Directing the attention of the jury to the one question of fact which you are to decide, viz.—which is whether the defendant was jointly responsible with the officer in causing and making the arrest, you will determine whether defendant by his conduct and his statements became responsible for the arrest. If you find that he was not, your verdict will be for the defendant. If you find that he was responsible jointly with the officer for the arrest, your verdict should be for the plaintiff.

6. *Compensatory damages.* In such case you will award plaintiff such compensatory damages as will justly compensate him for the injury sustained. The elements for which compensatory may be allowed include pain and suffering, if any, both mental

and physical, as well as for shame and mortification caused by the false arrest and detention. Compensatory damages can only be awarded in a case like this, unless the fact and circumstances appearing in the evidence disclose that the defendant acted with malice or maliciously. If it appears that defendant did act with malice, then exemplary or punitive damages may be allowed.

False imprisonment is an injury to the right of personal liberty; the right of locomotion, to go where you please as long as you are within your own rights. It also involves some right of social position.

7. *Exemplary damages.* If it appears from the evidence that the defendant acted with malice or maliciously, then the plaintiff may be entitled to exemplary or punitive damages.

Exemplary damages are damages in addition to compensatory damages; they are assessed for the sole and express purpose of setting an example so that other persons under like circumstances will have due regard for the rights of persons. If under all the facts and circumstances in this case the jury find that the defendant was not warranted in doing what he did, that he acted wantonly and recklessly, in disregard of the rights of the plaintiff; if you should believe that after hearing the statement of the plaintiff and his wife and their claims that they were married, that the defendant acted recklessly under all circumstances, that there was reasonable and fair opportunity for obtaining the knowledge of the fact before taking action, then you would be justified in assessing exemplary damages.

Malice as used in law, does not mean personal ill will, hatred or revenge; it means on the other hand, a lack of good faith; such reckless and wanton disregard of the rights of another as to constitute either a willful, or wanton, or intentional violation of such right.

On the question of the extent of the lack of good faith or malice, you will look to all the facts and circumstances concerning the presence of the wife of plaintiff in his room, as well as the manner in which the plaintiff registered as a guest. You may ask yourselves the question, how would the presence of the wife

in the room of plaintiff under the circumstances shown by the evidence, appear to an ordinarily prudent proprietor of a hotel, having due regard for the rights of his guest as well as for the good name of his hotel. You may consider what impression, if any, the facts and conditions shown by the evidence would have made on the mind of an ordinary prudent person who has and exercises proper regard for the rights of guests as well as of his own rights.

If the facts and circumstances are regarded by you as sufficient to cause an ordinarily prudent hotel proprietor to have a just and reasonable suspicion that the plaintiff was using the room for an immoral purpose, you may consider what steps, in such event, such a proprietor would have taken or should have taken to protect his hotel from such abuses or from such an abuse, if it had actually existed.

If it had turned out that the woman who was present in defendant's hotel and with whom plaintiff was having intercourse, which was discovered by the defendant, was not his wife, he would have had the right under the statute of this state, to have treated them both as being unlawfully upon his premises. He would have had the right to terminate the relation of guest and hotel proprietor. Under such circumstances, if that had been the fact, he would have had the right upon notifying them to depart, upon their refusal to do so, to have treated them as trespassers, and while so trespassing on his property, he would have been justified in causing their arrest for criminal trespass.

But it turns out in this case that there was no such violation of law and no such right to arrest. The jury will understand that it may consider these things mentioned by the court only as reflecting on the good faith, or the want of good faith, on the part of the defendant in anything that he may have done in this case having to do with the making of the arrest. If you find that there was reasonable ground of suspicion, as before stated, supported by sufficiently strong circumstances, which would have warranted the defendant in causing the arrest of the plaintiff, you may consider such fact as reflecting upon the good faith with which he may have acted in the matter, whether he was

warranted in believing under the circumstances that he had a right to cause the arrest of the parties. You may also consider the conduct of the plaintiff himself, whether he did what a reasonably prudent guest under such circumstances would ordinarily have done to dispel such suspicion and to disclose that he was not acting immorally, as reflecting upon the good faith of the defendant. The jury will look to all the evidence, facts and circumstances and determine the good faith or want of good faith of the defendant, and decide whether he acted with malice, or whether he acted prudently and in good faith.

If you find that he did not act maliciously, then you will not assess exemplary damages but will award only compensatory damages. If you find that he did act with malice, you will assess exemplary damages in addition to compensatory damages. The object and purpose of exemplary damages is to assess it rather by way of penalty, to set an example to mankind in general, to teach men to have due and proper regard for the rights of others under such circumstances. You may assess as part of such exemplary damages a reasonable attorney fee to compensate his counsel whose services were necessary to obtain redress for his injury.

The law in this state permits the jury in the assessment of exemplary or punitive damages to consider the standing and pecuniary ability of the defendant when the act is maliciously done, not otherwise. The law permits this when punishment is the object; not necessarily or directly to enhance the amount of the damages estimated upon what he may be able to pay, but instead to enable the jury to determine to what extent plaintiff was injured by the wrongful conduct of the defendant.¹

¹ *Davenport v. Young*, Franklin Co. Com. Pleas, Kinkead, J. Authorities on the responsibility of innkeeper in ejecting persons. See *Holden v. Carraher*, 195 Mass. 392; *State v. Steele*, 106 N. C. 766, 8 L. R. A. 516; *Hale on Bailments*, 276; *Wieseneck v. Havlin*, 1 O. N. P. (N.S.) 173; 16 Am. & Eng. Enc., 526; *Com v. Mitchell*, 1 Phila. 63; *DeWolf v. Ford*, 193 Mass. 397, 401.

A room in an inn occupied by a guest is not in a legal sense his dwelling house. *DeWolf v. Ford*, 193 Mass. 397, 401; *Rodgers v. People*, 86 N. Y. 360.

Sec. 1769. False imprisonment where fact of imprisonment and discharge conceded.

1. *Statement of claims of parties.*
2. *Burden of proof on plaintiff—Satisfied by fact of imprisonment and discharge.*
3. *Burden on defendant to prove justification that arrest was made when plaintiff in commission of misdemeanor.*
4. *When arrest may be made for misdemeanor.*

1. *Statement of claims of parties.* Plaintiff seeks to recover from the defendants in this case the sum of \$—— as damages for an alleged false arrest and imprisonment.

The defendants seek to justify the arrest and imprisonment on the ground that plaintiff was guilty of disorderly conduct, that he was intoxicated and that he was guilty of the use of profanity.

2. *Burden of proof on plaintiff—Satisfied by fact of imprisonment and discharge.* The burden is on the plaintiff to establish the essential elements necessary to constitute the wrong of false imprisonment. To sustain that burden he must introduce such evidence as will show a preponderance, or a greater weight of the evidence in his favor, which does not mean a greater number of witnesses.

When the fact of imprisonment is established, and his discharge without punishment is likewise established, the plaintiff is entitled to a presumption in his favor, a presumption of mixed law and fact, that such imprisonment was unlawful and that it is sufficient to constitute what may be termed a *prima facie* case, which satisfies the burden of proof which rests upon the plaintiff.

2. *Burden on defendant to prove justification that arrest was made while plaintiff in commission of misdemeanor.* Now the defendant is seeking to justify the arrest and imprisonment on the two grounds before mentioned. The burden then is upon him to show by a preponderance of the evidence that the plaintiff was engaged in the commission of the misdemeanors or one

of them alleged in his answer. The burden rests upon the defendant to show that the plaintiff was guilty of disorderly conduct, or of intoxication, or of the use of profanity.

4. *When an arrest may be made for misdemeanor.* An arrest may be made by a police officer for a misdemeanor,—that is an act punishable by a penalty other than imprisonment in the penitentiary,—without a warrant only when the person arrested is actually found by the officer at the time of his arrest in the actual commission of such misdemeanor. When an officer arrests a person for a crime, he is required to know what he is arrested for, and he must justify his arrest by facts, circumstances and conditions and what was said and done at the time. The liberty of men must not be interfered with unless there is reasonable and actual ground, in fact, in the case of misdemeanor, at the time of the arrest. There is no uncertainty about it at all, because the law requires that the person arrested must be in the actual commission of the misdemeanor at the time, otherwise he has no right to make the arrest.

CHAPTER CII.

FRAUD—FALSE REPRESENTATIONS, ETC.

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- 1770. Fraud not presumed—Burden of proving.
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- 1772. Fraud defined.
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Sec. 1770. Fraud not presumed—Burden of proving.

The court instructs the jury that fraud is never presumed, but must be proved by a preponderance of the evidence; the presumption of law is that the business transactions of every man are done in good faith and for an honest purpose; anyone who alleges that such acts are done in bad faith, or for a dishonest purpose takes upon himself the burden of showing, by specific acts and circumstances tending to prove fraud, that such acts were done in bad faith. The defendant is entitled to the benefit of this presumption in the consideration of this case until the jury find from the evidence that such presumption has been overcome.¹

¹ Fraud may be presumed to the extent that the law presumes to intend the natural results of his acts. *Jameson v. McNally*, 21 O. S. 295, 304. Never presumed. *Lake v. Doud*, 10 O. 415, 420; *Bohart v.*

Atkinson, 14 O. 228, 239; *Landis v. Kelly*, 27 O. S. 567, 569; Cooley on Torts, 556. As to distinction between fraud in fact and fraud in law, see Thompson on Trials, secs. 1930, *et seq.* Situations in which law presumes fraud. *Id.*, sec. 1936. What is called fraud in fact, is always a question of fact for the jury. *Id.*, secs. 1940, 1945.

Sec. 1771. Remedies for fraud—Rescission and restoration.

Fraud is never presumed by law, but must be proven. But where there has been such a fraud committed, as is charged in the petition, the law gives the defrauded party two remedies. He may, at his option, rescind the whole transaction and demand that the parties be restored to their original relations, or he may keep the property he has received and sue for the difference between its real value and that amount which he has paid for it. He has adopted, in this case, the latter course, and he enters suit for that difference from what he says was the real value of the property.¹

¹ Wright, J., in *Randolph v. Ammon*, 51 O. S. 585. The vendor may on discovery rescind the sale and sue for the value of the property. *Thurston v. Blanchard*, 22 Pick. 18; 33 Am. Dec. 700; *Moody v. Blake*, 117 Mass. 23; 19 Am. Rep. 394; or affirm the bargain and sue and recover damages for the fraud. Cooley on Torts, 589, and cases. He must restore goods or consideration. *Curtiss v. Howell*, 39 N. Y. 215; *Guckenheimer v. Angewine*, 81 N. Y. 394; *Bartlett v. Drake*, 100 Mass. 176; 97 Am. Dec. 92. As to remedy for fraud and deceit, see fully Kinkead's Code Pleading, sec. 606.

Sec. 1772. Fraud defined.

Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. Fraudulent representations are those proceeding from or characterized by fraud. Their purpose is to deceive. A fraudulent representation in law is one that is either knowingly untrue, or made without belief in the truth, or recklessly made and for the purpose of inducing action upon it.¹

¹ *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974, Am. Ann. Cas., 1913 A., 386; Cooley, Torts, p. 474.

Sec. 1773. Proof of fraud.

You are instructed that fraud is never presumed, but is to be proved like other facts, and the degree of evidence is like that prevailing in ordinary civil actions, and need not be proved beyond a reasonable doubt,¹ but only by a preponderance of the evidence.² It may be established by direct and positive evidence, and may also be proved by circumstantial evidence as well as positive proof;³ circumstances may be proven by competent evidence from which the inference of fraud which is alleged will naturally arise, and the jury will be justified in considering the fraud as proven by such inferences. The act or commission of fraud is so much different from the ordinary run of facts, that it is more difficult of proof; it is about as difficult sometimes to prove fraud as it would be to prove a criminal act, because the guilty party so frequently covers up and conceals his acts. If the circumstances which are proved by a preponderance or greater weight of evidence are such as to convince the jury that the fraud charged has been committed, they may so find.⁴

¹ *Eames v. Morgan*, 37 Ill. 260-2; *Strader v. Mullane*, 17 O. S. 624.

² *Id.*

³ *Strauss v. Kranert*, 56 Ill. 254.

⁴ *Jones v. Greaves*, 26 O. S. 2; *Lake v. Doud*, 10 O. 415; *Wilson v. Delarask*, 3 O. 290; *Cooley on Torts*, 475 (2 ed. p. 556). "Fraud is properly made out by marshaling the circumstances surrounding the transaction, and deducting therefrom the fraudulent purpose, when it manifestly appears, as by presenting the more positive and direct testimony of actual purpose to deceive; and indeed circumstantial proof in most cases can alone bring the fraud to light, for fraud is peculiarly a wrong of secrecy and circumvention, and is to be traced not in the open proclamation of the wrongdoer's purpose, but by the indications of covered tracks and studious concealments." (*Id.*) It need not be shown "conclusively." *Sparks v. Dawson*, 47 Tex. 138. "The proof need not be positive, but must from the nature of things be circumstantial." *Whittaker's Code of Ev.* 417, 502. The Court in *Pritchard v. Hopkins*, 52 Iowa, 120, charged that—"The defendant must establish the existence of fraud by a preponderance of the testimony before you can find for the defendant."

Sec. 1774. Contract to be rescinded and tender made.

If the plaintiff recovers, it is on the ground that the contract is set aside for fraud; but when a party wants to have that done, and to have his money returned, he must also return what he received from the other party for his money. In order for the plaintiff to recover in this case, even if he has made out the fraud he claims, it was incumbent on him to return or tender back to the company the certificate of stock he had received. If he did not do this, he can not recover, and to make such a tender sufficient it was necessary to produce the certificate and offer it to the representative of the company, unless the production and offer of it was waived by such representative.

The jury is instructed that if at Mr. G.'s office, H. was present as the representative of the defendant, and Mr. G., as the attorney of the plaintiff, told H. the reasons why M. desired the cancellation of his stock, and demanded that the company take back the stock and return M. his money, and if Mr. G. had the certificate of stock there ready and willing to return it, but was deterred from making an actual tender of the certificate, because H. denied the reasons and refused to take back the stock or entertain the proposition, then it was not necessary for the plaintiff to make such actual tender of the certificate by formally producing it and tendering it to H.¹

¹ From *The Cleveland Crucible Steel Co. v. Murdock* (S. C.), Cuyahoga County.

Sec. 1775. Election to rescind within a reasonable time for the jury.

A person complaining of fraud or misrepresentation is required to take steps to rescind the transaction within a reasonable time. Whether the plaintiff elected to rescind within a reasonable time after discovery of the fraud is a question to be decided by the jury.¹

¹ *Marple v. Railway*, 115 Minn. 262, 132 N. W. 333; *Am. Ann. Cas.* 1912 D.

Sec. 1776. Representation must be material.

“In the first place, it is obvious that the fraud must be material to the contract or transaction which is to be avoided because of it; for if it relates to another matter, or to this only in a trivial and unimportant way, it affords no ground for the action of the court. It must therefore relate distinctly and directly to this contract, and it must affect its very essence and substance. But, as before, we must say that there is no positive standard by which to determine whether the fraud be thus material or not. Nor can we give a better rule for deciding the question than this: if the fraud be such that had it not been practiced the contract would not have been made, or the transaction completed, then it is material to it; but if it be shown or made probable that the same thing would have been done by the parties in the same way if the fraud had not been practiced it can not be deemed material. Whether the fraud be material or otherwise seems to be, on the decided weight of authority, a question for the jury and not a question of law; but it is obvious that in many cases the jury can not answer this question without instructions from the court.”¹

¹ Hamilton, J., in *The Cleveland Rolling Mill Co. v. Joseph, et al.*, S. C. o. 2913, Cuyahoga County. Quoted from 2 Parsons on Contracts, p. 769 (5th Ed.). Must be material, *Ins. Co. v. Reed*, 33 O. S. 283; *Connersville v. Wadleigh*, 41 Am. Dec. 214. It must be a representation giving occasion to the contract, *Adams v. Schiffer*, 11 Col. 15, 7 Am. St. R. 202; *Pulsford v. Richards*, 17 Beav. 96. See Cooley on Torts, 580. They need not form the sole inducement; it is enough that they have formed a material inducement, *Mathews v. Bliss*, 22 Pick. 48; *Safford v. Grout*, 120 Mass. 20; *Fishback v. Miller*, 15 Nev. 428; Cooley, Torts, 587.

Sec. 1777. Misrepresentation by concealment.

It is not necessary that false representations be by express words, but they may be by mere concealment of material facts under such circumstances as make it the duty of the party to speak. Suppression of the truth where there is a duty to speak is as much a legal wrong as a positive falsehood, and is action-

able. If, however, there is no duty to disclose, failure to tell the truth is not actionable fraud.¹

¹ Jaggard on Torts, 575-77. Words not necessary, Cooley on Torts, 558, 565.

Sec. 1778. False representations without knowledge of truth or falsity.

“Although you may find from the evidence that defendant did not know that said representations were untrue, yet, if you believe from the evidence that, pending the negotiations for the purchase of said land, and for the purpose of effecting the trade and inducing said agent to make it, defendant made said representations as of his own knowledge (and they were untrue), but did not know whether they were true or false, and knew or had reason to believe that said agent relied on said representations as true, and said agent did so rely on them, and was thereby deceived and induced to trade for or purchase said land, you will find for the plaintiff.”¹

¹ Caldwell v. Henry, 76 Mo. 254, 256.

“If the party (defendant) made the representations not knowing whether it was true or false, he can not be considered as innocent; since a positive assertion of a fact is, by plain implication, an assertion of knowledge concerning the fact. Hence, if a party (if the defendant) have no knowledge, he has asserted for true what he knew to be false.” Insurance Co. v. Reed, 33 O. S. 294; Bigelow on Fraud, 61; Stone v. Covell, 29 Mich. 359, and cases cited; Woodful, 27 Ind. 4; Fisher v. Mellen, 103 Mass. 503; Taylor v. Ashton, 11 M & W. 400; Nugent v. R. R. Co., 2 Disn. 302; 5 Lawson’s R. & R., sec. 2352, and cases; Jaggard on Torts, p. 565 (2d ed. p. 582).

Sec. 1779. Ingredients of actionable fraud—Intent to deceive—Puffing and commendation—Complainant must be misled.

“FIRST. Telling a bare, naked lie is not actionable in and of itself. One of the ingredients of an actionable fraud is, that the falsehood must be asserted with the intention that another shall believe it true and act upon it; and such intention is

fraudulent, whether the person asserting the falsehood knew that it was false, or recklessly stated it to be true, not knowing whether it was true or false.”¹

“SECOND. The party asserting the falsehood must, at the time, intend to deceive. Fraud usually consists in intention.”

“THIRD. The falsehood must be not only in something material, but it must be in something in regard to which the one party places a known trust and confidence in the other. For if the falsehood be of such a nature that the party deceived by it had no right to place reliance upon it, and it was his own folly, in consequence of his not exercising common sense and ordinary discretion and sagacity, he can not maintain an action for the injury. Thus where a party, upon making a purchase for himself and his partners, falsely stated to the seller, to induce him to make the sale, that his partners would not give more for the property than a certain price, whereas, in truth, they expected and intended to give more, it was held that it was the seller’s own discretion to rely upon such false assertions. The common language of puffing and commendation of articles, in relation to such things as are equally open to the observation, examination and skill of both parties, and upon which it is understood that every buyer exercises his own judgment, comes within the rule above laid down; inasmuch as no one is supposed to be deceived by such false assertions. A confidential relation must exist between the parties.” “FOURTH. The false statement must be made to, or it must have been intended to operate upon, the party complaining.” “FIFTH. The party complaining of the deceit must be misled by the falsehood; for if he knows the assertion to be false when made it can not be said to influence his conduct.” “SIXTH. The falsehood must constitute an inducement or motive to the act or omission of the party deceived.” “SEVENTH. The party deceived must be misled to his injury; a damage must result from the party deceived acting on the faith of the falsehood. * * * In general, when the promisee is induced, by false and fraudulent representation, to enter into a contract that manifestly would not have been

made, except on the faith that such false representations were true, and being false, affected substantially his rights, he may repudiate such contract.''²

¹ 33 O. S. 283.

² Hamilton, J., in *Cleveland Rolling Mill Co. v. Joseph*, Cuyahoga Co.

Sec. 1780. Misrepresentation to existing or past fact.

The general rule of law is that the misrepresentation, to be actionable, must relate to an existing or a past fact.¹

¹ *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974; *Am. Ann. Cas.* 1913 A., 386; *Matthews v. Ely*, 149 Mo. App. 157.

Sec. 1781. Fraudulent promise coupled with present intent not to fulfil.

A promise to do an act in the future which is the medium of a deception, and which the promisor has no present intention to perform constitutes actionable fraud.¹ The intention to deceive is a condition of mind, and, when it exists, is as much of a fact as any other fact. That it is more difficult to prove does not change its inherent character. So a man's intention in doing an act is a fact admissible in any action which it helps to explain, to be proved by his words or inferred from his conduct.² A misstatement of a man's mind is therefore a misstatement of fact. The existence of the intent not to perform the promise at the time of its making constitutes the fraud.³

¹ *Ayres v. French*, 41 Conn. 142; *Barnes v. Starr*, 64 Conn. 136.

² *Spencer's Appeal*, 71 Conn. 638; *Dunham v. Cox*, 81 Conn. 268.

³ *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974; *Am. Ann. Cas.* 1913 A., 386; *Edgington v. Fitzmaurice*, 29 Ch. D. (Eng.) 459, 483; *Ayres v. French*, 41 Conn. 142; *Blackburn v. Morrison*, 29 Okla. 510, 118 Pac. 402; *Am. Ann. Cas.* 1913 A., 523.

Sec. 1782. Fraudulent promise not to engage in business.

A false representation by the seller of a business, that he was about to and would abandon such business in a city where it had been conducted, made to a purchaser with the intent of

deceiving him, is not a mere promise to do an act in the future, but has relation to an existing fact,—the immediate withdrawal of the seller from such business, and if coupled with an existing intent not to do so is fraudulent.¹

¹ *Sallies v. Johnson*, 85 Conn. 77, 81 Atl. 974; *Am. Ann. Cas.* 1913, A. 386;
Blackburn v. Morrison, 29 Okla. 510, 118 Pac. 402; *Am. Ann. Cas.*
1913, A. 523.

Sec. 1783. Representation as to value.

A representation concerning value is ordinarily to be treated as a mere matter of opinion and as such not fraudulent and actionable. But it may be otherwise. If it is made as an assertion of fact, and with the purpose that it shall be so received, and it is so received, it may amount to a fraud. A statement of value may be of such character, may be so made and intended and so received, as to constitute a misrepresentation.¹

¹ *Crompton v. Beedle*, 83 Vt. 287, 75 Atl. 331; *Am. Ann. Cas.* 1912, A. 399;
Hetland v. Bilstad, 140 Iowa, 411.

Sec. 1784. Jury to find what representations were made—Must be relied upon.

To entitle the plaintiff to recover in this case, she must prove that the defendant made representations to her, and to the father; that she and the father relied upon them; that whether, under the circumstances existing at the time, she had a right to rely upon those made to her. She must further prove such misrepresentations were false when made, and known to be so when made. She must further prove she was damaged, and pecuniarily injured thereby. If she proves these things, she will be entitled to recover; otherwise she will not. Look into the evidence then and determine—first, what representations he did in fact make. What representations to herself, and what to her father, either verbally or in writing, or in both. If none were made, that would end the case. But, if any were made

you must determine from the evidence what they were. It is not necessary you should find that he made each and all of the representations set forth in the petition, exactly as set forth therein, but it will be sufficient if you find he made substantially these representations.

(a) *Must have right to rely on them.*

If you find he made substantially such representations as alleged, you will then inquire whether she relied upon them. And if you find she did, you will then inquire whether, under the circumstances then existing, she had a right to rely on them;¹ and here I will say to you, if you find she had resided in —— at the time, and he and the father resided here, and correspondence was opened between them, and he wrote to her in a brotherly spirit, and intimated a disposition to protect her interests in the premises, then she had a right to rely on them. If you find she had no right to rely on the representations, she then would have no right to recover. But if you find she had a right to rely on them, you will inquire, were the representations so made, false, and if they were not, she can not recover, because she couldn't recover for fraudulent representations. If the representations were true, if they were not false, she can not recover. If they were false, you will then inquire, were she and the father deceived by them. If they were not, she can not recover. But if they were, and you so find, you will inquire, was she damaged then, or did she suffer pecuniary injury from these representations. If not, she can not recover. But if she did, and you so determine, she would be entitled to recover damages for such injuries as she has shown by the evidence, she has sustained thereby.²

¹ See Cooley on Torts, 577.

² Nicholas, J., in *Albright v. Thompson*, 27 W. L. B. 247. Judgment affirmed.

There is no liability if buyer relied on his own knowledge. *Wilkinson v. Root*, W. 686. A representation of what will or will not be permitted to be done, is one on which the party to whom it is made has no right to rely; and if he does so rely, it is his folly, and he can not ask the law to relieve him from the consequences. The

truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such. *Fish v. Cleland*, 33 Ill. 243, 33 O. S. 293.

Representations must have been acted upon. *Cooley on Torts*, 587.

Sec. 1735. Fraud on old person—What constitutes—Proof.

It is claimed that the fraudulent means used were practiced in part upon the plaintiff and in part upon the father, who, by reason of his great age and enfeebled condition of body and mind at the time, was unable to protect himself against the alleged fraud and fraudulent practices of the defendant, as alleged in the petition. On this subject the jury is instructed that fraud, though it is not presumed in such a case as this, but must be proven, yet it may be proven either by direct or circumstantial evidence; that is, by the proof of certain collateral facts, from which the existence of fraud may or should be inferred. It may be drawn from collateral facts which are proven in the case. One of the curious things about fraud is it can not be defined, it has so many and varied shapes that no single definition can cover them all; and it is well that it is so, because, if it had a legal definition, evil disposed persons would suit that definition and go perpetrating fraud, and would also ascertain the means to escape the consequences. Fraud, although it is not presumed, yet it may be inferred from collateral facts which are proven, and it may be then but an inference from these collateral facts.¹

We might go further and say: To constitute a cause of action for fraudulent representations, there must be bad faith. If the representations when made were believed to be true, and the facts of the case were such as to justify the belief, there is no fraud or deceit, and there can be no recovery.²

A representation is false and will furnish ground for recovery whether the party knew it to be false or not, if he had no reason to believe it to be true when made, and it was done with the intention of inducing the person to whom made to act upon

it, and the latter does so and sustains damage, there may be a recovery.³

¹ Nicholas, J., in *Albright v. Thompson*, 27 W. L. B. 247. Judgment affirmed. See cases *ante*, No. 198.

² *Taylor v. Leith*, 26 O. S. 428.

³ *Aetna Ins. Co. v. Reed*, 33 O. S. 283.

Sec. 1786. Fraudulent purchase of goods—Essential elements of fraud—Must have knowledge of falsity—Stating what is believed to be true—Statement without knowledge of truth—Must intend to deceive—Must be material—Party must be misled and damaged.

A falsehood, to amount to a legal fraud, must be accompanied by the following circumstances: First. The party asserting the falsehood must know at the time he makes the assertion that it is a falsehood. Hence, when a person asserts a thing which he believes to be true, but which in fact is false, he is not liable therefor by the reason of the fact that it is false, though another may be injured and deceived thereby, though if he state that to be true about which he has no knowledge and no reason to believe is true, and it is false in fact, then we may well question his belief in its truth, and it may be equivalent to stating that which he knows to be false. Second. The party asserting the falsehood must at the time intend to deceive. Third. The falsehood must be not only in something material, but it must be in something in regard to which one party places a known trust and confidence in the other. Fourth. The false statement must be made to or it must have been intended to operate upon the party complaining. Fifth. The party complaining of the deceit must have been misled by the falsehood. Sixth. The falsehood must constitute an inducement or motive to the act of the party deceived. Seventh. The party deceived must be misled to his injury. A damage must result from the party deceived acting on the faith of the falsehood.¹

¹ *Wilmut v. Lyon*, 49 O. S. 296. "The charge given was a correct statement of the law applicable to the case and is approved." *Id.*

Sec. 1787. Fraudulent purchase of goods, continued—Vendor may abide by or rescind contract.

The principal question, then, which will claim your attention is, was the purchase of the goods in controversy in this action fraudulent? If it was, then these plaintiffs had the right, on the discovery of the fraud, either to abide by the contract of sale or to treat the contract as wholly void and of no effect—that is, as if it had never been made, so far as the parties thereto and this defendant are concerned—provided they acted promptly upon the discovery of the fraud; and in the latter case, on election by them so to do, plaintiffs had the right to avoid the contract and pursue and take or replevin their goods. If they have done this and there was fraud in the sale, then they are entitled to your verdict. But if there was no fraud in this sale, then the company was the sole and complete owner of these goods on the completion of the sale, without the power of revocation on the part of these plaintiffs, and the defendant is entitled to your verdict.¹

¹ *Wilmot v. Lyon*, 49 O. S. 296, where charge was approved.

Sec. 1788. Liability of corporation for fraudulent representations of agents.

A corporation necessarily acts through its agents and is as much, and no more, bound by the false and fraudulent representations of its authorized agents as an individual; and both are bound by the authorized acts of his or its agents. If the directors of a company, acting as a body in the course of managing its affairs, or in the course of business which it is their duty to transact, induce a man, by false and fraudulent representations, to enter into a contract for the benefit of the company, the company is bound. But a company or corporation is not bound by the statement of one of its stockholders, or of one of its directors or officers, unless he also was an agent of the corporation and authorized to make statements in its behalf.¹

¹ *Wilmot v. Lyon*, 49 O. S. 296, approving the charge.

Sec. 1789. Fraudulent purchase of goods—Principal can not repudiate fraud of agent and accept benefit of contract.

But no man can adopt and take the benefit of a contract entered into by his agent, and repudiate the fraud on which the contract was based. If the agent at the time of the contract makes any representation touching the subject matter, it is the representation of his principal. The principal can not separate the contract itself from that by which it was induced; he must adopt the whole contract, including the statements or representations which induced it, or must repudiate the contract altogether.¹

¹ *Wilmot v. Lyon*, 49 O. S. 296. Charge approved.

Sec. 1790. Fraudulent purchase of goods—Power of agent to make statements as to credit and financial condition of principal in purchase of goods.

If the principal sends his agent into the market to buy goods for him on the principal's credit, I think the agent may, at least in the absence of instructions, be fairly held to be authorized to make statements as to the credit and financial condition of his principal. True, he would not in such case be authorized to make any but truthful statements. Yet, being authorized to represent his principal's credit and financial standing, if he does make false and fraudulent statements as to material facts to the seller, and thereby induces a person who rightfully relies upon them to part with his goods by a sale to the principal, that principal can not honestly or legally retain the goods thus obtained by fraud from the seller, if the seller, on discovery of the fraud, promptly repudiates the contract of sale and demands a return of the goods, the seller at the same time returning or offering to return anything which he may have received in exchange therefor.¹

¹ *Wilmot v. Lyon*, 49 O. S. 296. Charge approved.

**Sec. 1791. Purchase of goods with intent not to pay for them
—Insolvency of purchaser concealed.**

A contract for the purchase of goods on credit, made with intent on the part of the purchaser not to pay for them is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. But where the purchaser intends to pay, and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent, and does not disclose it to the vendor who is ignorant of the fact.

If, when the agreement of purchase was made, there was a fraudulent concealment, within the definition already given, on the part of the company of their insolvency, knowing themselves to be insolvent, it would still be fraudulent. When a party thus enters into negotiations for the purchase of goods, and offers to buy or is content to buy upon application, and gives his promise to pay, in my judgment, whether he says anything about it or not, it is understood by both parties that he has a reasonable expectation of being able to pay—whether he says so in words or not.

Whether, therefore, a contract of purchase, where the purchaser fails to disclose his own insolvency is fraudulent or not depends on the intention of the purchaser; and whether that intention was to pay or not to pay is a question of fact and not a question of law. Being a question of fact, it is for the jury to solve from the evidence in the case.

In the solution of this question, though it be one of fact, it is true, however, that certain presumptions arise which are entitled to consideration and force. Thus fraud must be proved and is not to be presumed—but is to be proved like any other fact, still positive and direct proof or evidence is not always required or possible, but the proof may be gathered from all the circumstances in the case. While it may be that fraud must be proved and will not be presumed, still there is a presumption that every reasonable person anticipates and intends the ordinary and probable consequences of known causes and conditions. Hence, if

a purchaser of goods has knowledge of his own insolvency, and of his inability to pay for them, his intention not to pay may be preferred if the jury believe and find that the evidence sufficiently warrants such inference. It may conclude, if it deems proper, that an insolvent purchaser, who is without reasonable expectations of ability to pay, should be presumed to intend not to pay. Indeed, an intention not to pay may be inferred from the mere fact that the purchaser had undisclosed knowledge of his gross insolvency; but, in such case, the inference may be rebutted by other facts and circumstances.

It is claimed that in good morals a purchaser knowing himself to be insolvent should not accept credit from one ignorant of the fact. Whether this proposition be true or not, it is enough to say that the law, in its practical morality, does not afford a remedy for the violation of every moral duty. While, therefore, a purchaser of goods by an insolvent vendee who conceals his insolvency with intent to injure the vendor is fraudulent and voidable, yet a purchase under like circumstances, save only that such intent is absent, is not in law fraudulent.

The simple failure to disclose the fact (of insolvency), however, is not equivalent to its concealment. The latter implies a purpose—a design; the former does not. If, then, such knowledge on the part of the purchaser be necessary to make out a fraud, it is because it becomes the predicate of an intent—and intent to injure.

Now, gentlemen, what do you say upon all the facts of this case? Was this company insolvent at the time of this purchase? Did they know it, and did they conceal? Having no reasonable expectation that they would be able to pay for the goods, did they conceal the fact of that insolvency? If they did, then I say to you, whether they said anything at the time or not, did any other act of concealment or artifice or not, the simple concealment of those facts, that they were insolvent and that they did not intend to pay, is enough to make an actionable case, and to vitiate and avoid the sale. If they had an honest belief in their solvency, an honest belief that they could

turn these goods and pay for them, and expected to do it, then, whether insolvent or not, the sale was not a void one.¹

¹ As given by Hamilton, J., in *Wilmot v. Lyon*, 49 O. S. 296, and founded on *Talcott v. Henderson*, 31 O. S. 162. The charge has been modified in some respects so as not to appear to be too much of a specific direction to the jury, and may be still further varied according to the wish of any one using the form. The charge was attacked, but was held to be a correct statement of the law applicable to the case. As to proof of intent see *Oswego Starch Factory v. Landrum*, 27 Iowa, 573. A man intends the natural results of his acts. *Arnold v. Maynard*, 2 Story, 353. For cases holding contrary to the charge, but which were considered by the Supreme Court both in the *Talcott* and *Wilmot* cases and not followed, see *Nichols v. Penner*, 18 N. Y. 295-300; *Lupin v. Marie*, 6 Wend. 77; *Conyers v. Ennis*, 2 Mass. 236; *Mitchell v. Worden*, 20 Barb. 253; *Smith v. Smith, Murphy & Co.*, 21 Penn. 367; *Hennequin v. Naylor*, 24 N. Y. 139; *Bidault v. Wales*, 20 Mo. 546; *Powell v. Bradlee*, 9 Gill and John, 220-276.

Sec. 1791a. Mercantile agency—Liability for false reports as to financial standing.

The jury is instructed that if the statement given to the ——— agency was substantially true, as claimed by defendants, and it was the sole representation which came to the plaintiffs, and that only through the agency, then, in so far as the plaintiffs' claim depends upon alleged fraudulent oral or written representations, no recovery can be had by plaintiffs. But if you find the statement was made to the agency, and that it was false in whole or in part, then inquire whether it was given with the intent of the part of the company to have it used as a continuing representation among the patrons of the agency for the purpose of obtaining credit for the company by showing its financial standing until it should be otherwise changed or modified by the company. And to determine this, look to the character of the statements themselves; see whether the facts detailed were liable to change by lapse of time, or were they of a permanent nature? What was the custom and usage of the agency in treating them as continuing or otherwise? And what knowledge of such custom had the company? What other reports,

if any, did the company make to the agency covering the facts of the original statements of ——? And if you shall find it was not intended or designed to be a continuing statement, then, whether true or false, it was too remote in point of time to authorize plaintiffs or anyone else, nearly four years after, to rely upon its statements, and can not be the foundation of recovery in this case. But if you find it was intended and designed by the company as a continuing representation, and was in fact so used, to the knowledge of the company, then apply to it the rules of law already given, and the facts as you shall find them to be, and determine whether the representations therein contained were so used as to render this sale fraudulent.

Sec. 1792. Transfer of property by one in debt without consideration.

You are instructed that if a person who is in debt transfers his property to another, without consideration, or good and valuable consideration, without retaining sufficient property to pay his debts, such transfer would be fraudulent as against the creditors of the person so transferring said property. But you are instructed that when a person is in debt and his property is encumbered by mortgages or other liens, he has the right to borrow money and give security on any or all of his property to secure the payment of the money so borrowed, providing such transaction is a *bona fide* transaction and done in good faith.¹

¹ Nye, J., in *Beebe v. Ensign*, Lorain Co. Com. Pleas.

Sec. 1793. False representation in sale of horse as to being vicious—Purchaser injured while driving—Effect of his own knowledge and care.

Action for damages resulting from fraudulent representations in purchase of pair of carriage horses, which are claimed to be vicious and unmanageable, and dangerous to drive.

If the jury finds from the evidence that the alleged injuries of the plaintiff were caused by the wrongful acts of the defend-

ant set out in the petition, whereby the plaintiff sustained his injuries, he is entitled to recover. If you find that the plaintiff's case is not made out by the evidence, your verdict should be for the defendant; or if you find that the injuries to the plaintiff complained of would not have occurred but for the negligence or mismanagement of the plaintiff at the time the injuries occurred, or if you find from the evidence that he had knowledge of the vicious and ungovernable character of the horses, and, notwithstanding that knowledge, negligently and unreasonably exposed himself to the hazards by which he was injured, by driving them when he ought to have known that it was dangerous and imprudent to do so, then he would be treated in law as having taken upon himself risks arising therefrom, and can not recover for the alleged injuries to his person, vehicle, or harness. For the law requires of the complaining party that he should act with reasonable care and prudence under the circumstances in regard to hazards known to him, or that reasonably ought to be known to him, and if he acts otherwise voluntarily, he can not charge the consequences of his folly to another. The rule of law is that when one voluntarily encounters a known hazard, he takes upon himself the risks resulting therefrom. So, we say to you, if but for his folly, the injuries complained of would not have happened, he can not recover. It is a rule of law as well as a sound conclusion of common sense and justice, that a person can not hold another for the consequences of his own folly.

Perhaps the rule would be better stated as follows: The plaintiff can not recover any compensation for any damages which he might reasonably have avoided by the use of ordinary care and prudence under the circumstances. So, if he voluntarily exposed himself to hazards he ought not to have encountered under the circumstances, which were known to him, and he thereby received injuries, he can not recover therefor.

So, if his injuries were the result of mere accident, he can not recover therefor. But in the absence of knowledge to the contrary, if the plaintiff acted in good faith, he would be entitled

to believe that the defendant made truthful representations to him respecting the horses so sold to him, and in using them in a reasonable and prudent manner he would not be exposed to the hazards of using vicious and ungovernable horses.”¹

¹ Voris, J., in *Sampsell v. Thurman*, Lorain Co. Com. Pleas.

**Sec. 1794. Same, continued—Vendor’s knowledge of defects
—Duty to give notice.**

It is a general rule that whenever a vendor has, or reasonably ought to have had notice of the defects in the horses calculated to do serious harm, of which the vendee has no notice, and neglects to notify the vendee, he becomes liable to him for damages produced by such neglect.

The fact that the plaintiff gave no notice to the defendant of the first runaway, if you so find the fact to be, or of any other fact, on the same coming to his knowledge, if any, respecting the alleged vicious and ungovernable character of the horses, may be considered by you in determining whether he in good faith relied upon the representations of the defendant (after the first runaway) or took upon himself voluntarily the risks of continuing to drive them afterwards.

But the court says to you that the failure to give such notice of itself does not deprive the plaintiff of the right to recover.

“If you should find from the preponderance of the evidence that the defendants made the representations set out in the petition to induce the plaintiff to purchase the horses, that, by reason thereof and relying upon them, the plaintiff, not knowing anything to the contrary, purchased the horses, and you further find that the horses were unsound and vicious, restive, ungovernable, or worthless in harness when purchased, and that the plaintiff sustained damages thereby, then you should find for the plaintiff, though you should find that the defendant did not know the vicious character of the horses and did not intend to deceive and defraud the plaintiff.”¹

¹ Voris, J., in *Sampsell v. Thurman*, Lorain Co. Com. Pleas.

Sec. 1795. Same, continued—Measure of damages.

The plaintiff can not recover for defects in the horses other than those alleged in the petition. But it will be sufficient if you find that some of them existed which constituted a breach of the contract and caused the injuries complained of. In which case, and should you further find that the defendants did not know the vicious character of the horses, and did not intend to deceive the plaintiff, but acted in good faith in making the representations, then the measure of damages would be the difference between the actual value of the horses when sold and what the value would have been had they been as represented to be by the defendant, to which difference you may add interest from the day of the sale to the first day of this term, the sum of which difference and interest will constitute the amount of your verdict.

But if you should find that the defendants made said representations not in good faith, but with intent to deceive and defraud the plaintiff, you may add to said sum so as aforesaid found such further sum as, in your judgment, guided by the evidence and these instructions, as will compensate the plaintiff for the injuries caused by the wrongful acts of the defendants as herein defined and limited. This may include compensation for impaired health, mental anguish, physical suffering, expenses incurred for surgical attendance and nursing, bodily injury, loss of time, considering either constant or probable duration, its effect upon his health and physical powers, his incapacity for labor, the pursuit of his profession, or other business, as you find the facts to be, upon the evidence.

As a guide, you are instructed that the legal damages that follow the wrongs complained of are only such as according to common experience and the usual course of events might be reasonably anticipated (23 Ohio St., 632). If in such injury to his property that you may find from the evidence was caused or sustained by reason of want of exercise of reasonable care or prudence on the part of the plaintiff, and which he would have

avoided had he conducted himself with reasonable care and prudence, he can not recover.¹

¹ Voris, J., in *Sampsell v. Thurman*, Lorain Co. Com. Pleas.

Sec. 1796. Representations assumed to be within one's knowledge, but truth not known—Recklessly made.

Whether in this case the defendants made the representations alleged, and whether they were false, and, if they did make them, whether they were made for the fraudulent purpose alleged, are questions exclusively for your determination from the evidence submitted to you; and in determining these, you are admonished that fraud is not to be presumed by you, except as established by the evidence.

Material representations made by a vendor of matters assumed by him to be within his personal knowledge are false and fraudulent in a legal sense if made with the intent to deceive the purchaser, if they are untrue and are relied upon by the vendee in making the purchase, and he is damaged thereby, although the seller did not know them to be untrue; or if he recklessly makes a false representation of truth of a matter of which he knows nothing, for the fraudulent purpose of inducing the purchaser to enter into a contract, and the purchaser enters into it relying upon the same, the vendor is as much liable as if he knew the statement to be false at the time he made it.¹

¹ Voris, J., in *Sampsell v. Thurman*, Lorain Co. Com. Pleas.

Sec. 1797. Fraud in sale of land—Preventing examination of land.

“If the jury believe from the evidence in the cause that plaintiff, at or before the sale of the land in question to the defendant, knowing said land to be subject to overflow, used any artifice to mislead the mind of the defendant and throw him off his guard, and to prevent him from making as careful examination of the land in question as a man of ordinary prudence would otherwise have made; and that defendant was thereby misled and thrown off his guard, and prevented from examining said

land, and in consequence thereof, was and remained ignorant of the fact that said land was subject to overflow up to the time when he bought said land, then, in that case, the jury should find for the defendant and assess his damages according to the measure heretofore stated by the court.”¹

¹ *McFarland v. Carver*, 34 Mo. 195, 196.

Sec. 1798. Fraudulent representations as to location of city lot.

“If you believe from the evidence that, at the time plaintiff purchased said lot, the defendant knew that it was intended as a residence lot; and if you further believe that he then and there told said defendant where and on what part of said lot he wished to build his house, and what the style of such house should be, and in what direction it should front; and if you believe that said defendant then and there, as an inducement to plaintiff to purchase said lot for a residence, represented to him that there was a street on the east and on the north side of him; and if you believe that by said representations plaintiff was induced to purchase said lot for the sum of \$—— for the purpose aforesaid, and that such purposes were known to the defendant; if you believe that plaintiff then and there made said purchase, and proceeded to build and did build a residence in the northeast corner of said lot, fronting east and north, and that such design was communicated to the defendant at and before said sale; and you further believe that said representations of defendant, made about a street on the north were false, and known to the defendant at the time they were made to be false; and if you believe that plaintiff has been damaged thereby, then you will allow him for the same.”¹

¹ *White v. Smith*, 54 Ia. 233, 236, 237.

Sec. 1799. Whether son fraudulently persuades parent to make beneficial dispositions of property to him.

This defendant had a right to importune and persuade the father to make such disposition as would be most beneficial to

him, but in such importunity and persuasion, he must be careful not to make use of any unfair means, must make no false representations of the facts to the father, nor perpetrate any other kind of fraud to induce him to make such disposition in his favor. If the father did dispose of his property upon mere incessant importunity and persuasion, unmixed with fraud, in a manner that might benefit the defendant, as the result of such incessant persuasion, the transaction wouldn't be fraudulent on that account, couldn't be impeached for fraud. If in the use of such importunity and persuasion, he resorts to unfair means, or false representations of the facts, or other fraudulent means, he can not be permitted to enjoy the fruits of his wrong-doing or the advantage obtained by such means. In your search for the truth in the case you must weigh all the evidence before you.¹

¹ Nicholas, J., in *Albright v. Thompson*, 27 W. L. B. 247. Judgment affirmed.

Sec. 1800. Representations as to value of stock—Such statement when actionable—Mere opinions.

It must be shown by a preponderance of evidence that there was some actual assertion made by the defendants that the stock of goods was of a certain value, and that the plaintiff relied upon the same, and that the statements were untrue, and that plaintiff was thereby misled to his injury.

The statement or assertion that is relied upon must be positive; not a mere assertion or opinion, but must be intended to have the effect of influencing the mind of the other party.

(a) *Mere opinions.*

It must not be a mere expression of opinion on the matter, or guesswork, and not intended to influence the mind of the other party, but it must be a positive statement that does have influence on the mind of the party to whom it is made.¹

There is no particular form of words necessary; no particular expression is necessary to make such a statement as is referred to, but any distinct assertion of the value of this stock, or any direct assertion to lead the plaintiff to believe it was of such value will be sufficient; and the statement must have been

made so as to have induced the plaintiff to purchase; and, if that is so, and the plaintiff was thereby induced to purchase, it is immaterial at what stage of the negotiations it was made, if previous to the conclusion of the contract between the parties. If representations of value were not made until after the sale was consummated, of course it would not have been an inducement, and can not be considered in the case. It must have been made before the sale was consummated fully. It is necessary also for the plaintiff to show that he relied on this statement of the defendant in the case; for, if he made the purchase not relying on these representations, but relying upon his own judgment, or that of outside parties, then he can not be said to have been misled by the defendants' misrepresentations.

* * * If you find from the evidence that the defendants simply priced their stock at \$——, without misrepresentation of the same, and its value, you will be justified in finding for the defendants, because a man has the right to sell his property for all he can get for it, providing he makes no false representations. He has the right to remain silent in such cases. But there are cases in which silence is as much falsehood as speech, but I need not undertake to define them to you. But where a party has the right to remain silent and does not mislead the other party, and allows the one with whom he is trading to act on his own judgment, he is not bound to lay before the other party all the facts about the matter, and advise him about all the minute details, but he is bound not to deceive him.²

¹ Representation of mere opinion not actionable, 5 Lawson's R. & R., sec. 2345; Drake v. Latham, 50 Ill. 270; Jaggard on Torts, 577; Cooley on Torts, 565.

² Calvin D. Wright, J., in Randolph v. Ammon, 51 O. S. 585. The case was reversed by the Circuit Court by sustaining a demurrer to the petition, and this was modified by the Supreme Court, and sent back for new trial, which rule would not affect the charge.

Sec. 1801. Fraud in obtaining insurance policy alleged by defendant.

1. *Claim of defendant of false answers to interrogatories.*
2. *The statute concerning same.*

3. *Burden on him who attacks a transaction as fraudulent*
—*Honesty and truthful answers required of applicant.*
4. *Same—Degree of evidence required in such case.*
5. *Credibility of witnesses. See sec. —.*
6. *Fraud—Its definition and elements.*

1. *Claim of defendant of false answers to interrogatories.* Defendant says that it was induced to make and deliver the policy of insurance by reason of the fraudulent concealment and misrepresentation of W., same being material to the risk, and not known to the defendant at the time of the issuance of the policy; that the policy would not have been issued had it not been for the false and fraudulent representation. The fraud and misrepresentation claimed and alleged by defendant is denied by the plaintiff. The issue is therefore clearly drawn as to the truth of the claim of fraud.

Under the issues in this case the question for the jury to decide is whether the deceased, W., made an answer to any interrogatory as an applicant for insurance in his application which was wilfully false or fraudulently made; whether such answer, if it was wilfully and fraudulently made, was material; whether it induced the company to issue the policy; whether the defendant company would not have issued the policy on which this action is brought if the alleged wilfully false and fraudulent answer had not been made, if it was made.

2. *The statute concerning same.* The statute of this state provides that: "No answer to any interrogatory made by an applicant in his or her application for a policy shall bar the right to recover upon any policy issued therein, or be used in evidence upon any trial to recover upon said policy unless it be clearly proved that such answer is wilfully false, was fraudulently made, that it is material, and induced the company to issue the policy, and that but for such answer the policy would not have been issued, and also, that the agent or company had no knowledge of the falsity or fraud of such answer."

3. *Burden on him who attacks transaction as fraudulent.* It is presumed that every business transaction of every man is in good faith, and for an honest purpose. Therefore and for that

reason, and because of that presumption it is incumbent on one who alleges that an act done, or a statement made is in bad faith and made for a dishonest purpose, to prove that the same was made in bad faith by either facts or circumstances from which the jury may infer and conclude that it was made in bad faith, and hence that it was fraudulently made.

A contract of insurance, like any other business transaction, is one which eminently requires good faith, honesty and integrity of the statements on the part of the applicant for insurance. Such good faith, honesty and truthful answers by the insured lies at the foundation of the contract of insurance, imposing upon him the duty and obligation of making truthful answers to questions which are calculated to bring knowledge to the insurance company as to the physical condition of the applicant which would enable it to determine whether the applicant will make a suitable risk for it to issue a policy of insurance upon.

It is the duty of an applicant, and it was the duty of the insured in this case, not to conceal the fact that he was treated by a physician, or that he consulted a physician, if he did so conceal these facts and you so find under the evidence. It is his duty to disclose to the company the last time or times he consulted a physician, truthfully and honestly, and it is his duty to disclose what disease, if he knows, he was suffering from and he did so consult a physician.

Because the law presumes in the absence of proof to the contrary, that the contracts of men are honestly made and in good faith, the burden is cast upon the one attacking the good faith of such a transaction to prove it. And the burden is upon the defendant in this case to prove the falsity of the answer in question; that it was material; that defendant relied upon it and was induced to issue the policy because thereof.¹

4. *Same—Degree of evidence required in such case—Clear evidence.* In ordinary civil cases the degree of evidence of a party

¹ Wood v. John Hancock Life Insurance Co., Franklin Com. Pleas, Kinkead, J.

upon whom the burden of proof rests is to establish the facts averred and claimed by him by a preponderance of evidence. This means the greater weight of evidence, considering the weight and credit. Absolute certainty not being always possible or required, the law under such degree of evidence permits the jury to consider probabilities, to conclude whether from the evidence the fact or facts is or are probably true. The statute applicable to this case requires the defendant company to clearly prove that such answer was wilfully false and fraudulently made; that it was material and relied upon. The requirement that the fraud shall be clearly proved is imposed by law because the good faith of the insured in making the contract is challenged. There is a distinction between a probability and clear proof. Probability is that which appears probable; anything that has the appearance of reality or truth. Clearly proving a fact is to prove it in a clear manner. For a fact to be clearly proved is that it may be proved so that the jury is able to see or perceive clearly or distinctly the fact alleged and in dispute. So the burden placed by the statute upon the defendant in this case is to clearly prove the fraud alleged and claimed by it.¹

5. *Fraud—Its definition and elements.* One of the curious things about fraud is that courts hardly ever undertake to define it. It is rather difficult of definition because it has so many varied forms and shapes that no single definition can hardly be framed to cover all kinds of fraud. The elements of fraud that may enter into all fraudulent transactions are bad faith, intentionally mis-stating a fact, intentionally concealing a fact which, if the truth would be communicated instead of the false statement, the contracting party,—that is the other contract party,—would not have entered into the contract. Telling a bare, naked lie or concealing a fact known to a party will furnish ground for relief only when it is done with the intention that another shall believe the affirmative falsehood, or that he will believe in the existence of the fact which the thing or fact fraudulently concealed would have disproved.

¹ Wood v. John Hancock Life Insurance Co., Franklin Com. Pleas, Kinkead, J.

If you find that the deceased insured, H. W., made a false statement when he stated in the application for insurance that the last time he consulted a physician was in November, 1909, and that it was for overwork and for nervousness; that he was fully recovered and that he was treated by a physician, that he did not consult a physician at other times than as claimed in the testimony, you will then consider the good faith, honesty and integrity of that statement and of H. W. in making it; whether it was clearly made in bad faith with the intention to deceive the defendant and obtain the issuance of the policy; whether it was false, material and induced the company to issue the policy.

The jury is instructed that it may consider and determine whether the answer and statement of the deceased insured was such a wilfully false and fraudulent statement as to be material in the issuance of the policy without regard to the existence or non-existence of the disease from which he suffered. Under the law a material representation by an answer to an interrogatory in an application for insurance as to a fact may make the same void,—that is, the policy void. The fact in controversy here is the last treatment by a physician. Another fact is what the disease was for which he was treated. These are the two facts involved which the jury are called upon to determine; whether either one or both of them was truthful or false. You are instructed that if either one of these facts alone in your judgment constitutes a material and false representation, which, if relied upon, operated as an inducing cause in the issuance of the policy by the defendant company to H. W., if either one or both of the statements were false, it constitutes a full defense to this action. If they are truthful, of course they do not. If you find the answer to have been wilfully false, that it was fraudulent, and that if the company had known that the insured was treated at the times claimed in evidence by the defendant, and that it would have been of such materiality as that it is clear to you that the company relied upon it and was thereby induced to issue the policy, and whether but for the false statements and fraud it would not have issued the policy, then in that event, of course, your verdict would be for the defendant.

Insurance is a risk. It is taking a chance on the life of another, in a sense, for a consideration, and the company has a legal right to full and honest disclosures on the part of the insured of all material facts which may or may not induce it to issue the policy. It must also be made to appear that the agent of the company had no knowledge of the falsity or fraud of such answer. By such agent is meant the one receiving and taking the policy and not the examining physician.¹

¹ Wood v. John Hancock Life Insurance Co., Franklin Com. Pleas, Kinkad, J.

Sec. 1802. Measure of damages when plaintiff exchanged land for merchandise—Market value of land not considered.

If you find for the plaintiff you will allow him as damages by the application of the following rule. If you find that defendant made misrepresentations concerning the value of the stock of merchandise which he exchanged for the land, plaintiff will be entitled to recover the difference between the market value of the merchandise as it actually was and as represented, unaffected by the market value of the land. It makes no difference whether plaintiff agreed to pay in money or property. In either event he is entitled to the price he fixed and which the other party undertook to pay; he can not be compelled to accept a lower price because of another's fraud, and thereby allow a wrongdoer a bargain he could not have obtained by fair dealing. When compelled to make good his representation, he should be required to pay the injured party that which he represented to him he would receive, and for which the innocent party parted with, which as stated is the difference between the market value of the merchandise as it actually was and as represented, unaffected by the market value of the land.¹

¹ Stoke v. Converse, 153 Iowa, 274, 133 N. W. 709; Am. Ann. Cas. 1913, E. 270; Ryan v. Miller, 236 Mo. 496, 139 S. W. 128; Am. Ann. Cas. 1912, D. 540.

**Sec. 1803. False representation concerning merits, working and adaptability of patented machine—
Claimed by cross-petition.**

1. *Representation and warranty distinguished.*
2. *Essentials of a representation.*
3. *Duty of purchaser to be reasonably diligent—When facts peculiarly within knowledge of other party.*
4. *Existing facts distinguished from opinion and dealers talk.*
5. *Matters within knowledge of vendor—Purchaser without knowledge, and inspection impossible without great expense.*
6. *When operation and utility of an invention matter of opinion.*
7. *General commendation open to difference of opinion.*
8. *Direction to jury to apply the law and find the facts.*
9. *Circumstances may establish falsity.*
10. *Must be material and relied upon.*

1. *Representation and warranty distinguished.* The pleading of defendants refers to the language of the representation as a warranty. As matter of language there may be no difference whatever between a representation and a warranty, although the external distinction between them are some times marked by the fact that a warranty is a part of the contract, whereas a representation is in no case more than an inducement to a contract; it is never part of one.

2. *Essentials of a representation.* The representation must be of a fact, and not of an opinion, it must be false, and a material inducing cause operating upon the mind of him to whom it is made to his injury or detriment, and it must be made by the person in bad faith with knowledge of its falsity and with a purpose to mislead. The one claiming its falsity must show that it was actually false and fraudulent, that is, that he did not have an honest belief in its truth, and with an intention of inducing the one to whom it was made to act upon it.

The question is whether the statement by plaintiff to defendants with reference to the merits, working and adaptability of the machine comes within the class of representations which are considered in law as fraudulent if they are not true in all respects as made.

3. *Duty of purchaser to be diligent*—*When facts peculiarly within knowledge of other party.* The general doctrine of the law is that under ordinary circumstances a purchaser or lessee is required to use reasonable diligence to avoid deception. And in general, and in the absence of special conditions, circumstances and relations between the parties, the subject-matter of the representation is a fact or facts, may not be entirely, solely and peculiarly within the knowledge of the vendor, or lessor, and may be one as to which the purchaser or lessee may have equal and available means and opportunity, in whole or in part, for information; and in such case if no artifice or deception is used to prevent inquiry or investigation, the rule is that a purchaser or lessee must make use of his own means of knowledge, and failing so to do, he can not recover on the ground that he was misled. Reasonable diligence is all that is required, and this must depend upon the particular conditions and circumstances. [20 Cyc. 49.]

4. *Existing facts distinguished from opinion and dealers talk.* And a false representation of an existing fact for which the law affords redress is to be distinguished from what, in particular cases, may be considered as nothing more than a mere expression of an opinion which furnishes no ground of liability except in exceptional cases. Coming within the classification of the expression of opinion are what are considered as “dealers talk,” such as general assertions and expressions in commendation of anything sold or leased. In some instances, statements which are merely descriptive of the operation and utility of anything the subject-matter of sale or lease are to be considered as mere expressions of opinion, or “dealers talk,” upon which the purchaser or lessee can not safely rely.

5. *Matters within the knowledge of vendor*—*Purchaser without knowledge, and inspection impossible without great expense.*

But if the matters covered by the statements of vendor or lessor are peculiarly within his knowledge, and the purchaser or lessee is ignorant thereof, or is ignorant of the business, or knows nothing of the nature and quality or operation of the subject-matter of the sale or lease, and the same is situated at a distant place so that an inspection can not be made without expense and inconvenience, the purchaser or lessee may then safely rely on the vendor's or lessee's positive statements regarding the property. [20 Cyc. 58; 13 Minn. 223; 29 N. J. Eq. 257.]

6. *When operation and utility of an invention matter of opinion.* The rule of law is, that in some cases and under certain circumstances, statements as to the operation and utility of an invention may be mere matter of opinion, upon which a purchaser can not safely rely.¹

7. *General commendation open to difference of opinion.* And again it is settled law that there is no legal responsibility for general commendations which are manifestly open to a difference of opinion, and which do not necessarily imply untrue assertions concerning matters of direct observation, and as to which persons in general do not place reliance.²

8. *Direction to jury to apply the law and find the facts.* The foregoing statements of general doctrine have been given the jury to be applied in weighing the admitted language used in the statement concerning the quality and capacity of the machines, in the light of the conflicting testimony of the persons having knowledge of the construction and operation of the different types of pea viner machines, who have given their testimony in this case, both as to their practical mechanism and their operation, as well as their opinions touching the quality and capacity of the machines in question; and also to enable you to determine, in the light of the evidence, whether the statements used by the plaintiff—considered in the light of the conflicting evidence—were the mere statement of an opinion, as

¹ *Neidefer v. Chastain*, 71 Ind. 363, 36 Am. Rep. 198; *Bigelow*, *Fraud*, 13; *Hunter v. McLaughlin*, 43 Ind. 38, 9 Ind. 572; 4 Blackf. 57.

² *Deming v. Darling*, 148 Mass. 504, 2 L. R. A. 743; *Dealers talk*, 53 Cyc. 20, 41 Am. Rep. 215, 19 Am. Rep. 315.

that term is understood in law, and as explained to you in these instructions, or whether it was the statement of a fact or facts, the subject of false representation in law. There is too much difficulty underlying the philosophy of the distinction between opinion and fact, the subject of false representation, as found among the authorities to warrant much further reference thereto in these instructions to a jury. It is sufficient to state that each case must depend upon the special facts attending the same, and particular rules can seldom be framed to reach them, and general rules may have only a remote bearing. I have, however, as best I could, endeavored to so state the general rules in such a way as to draw your attention thereto as they bear upon the special circumstances of this case.

The jury are aware that you will have to determine which view of the question of the quality and capacity of the machines in question you will take, as disclosed by the conflict in the testimony or as disclosed by the evidence; whether the one which will render the statements of plaintiff false as false representations, and to the extent that you may find that the plaintiff made them with knowledge of their falsity, and with a dishonest intention and purpose to create a clear impression and belief on the part of the defendants of the existence of a fact or facts, which if true, would be sufficient to influence their conduct in taking the machine, rendering the plaintiff responsible therefor to the extent of denying it relief; or, whether you will find that they were mere expressions of commendations as in "dealers talk" and falling within the classification of opinion, which will prevent plaintiff from recovery in this action. But the jury may consider whether a part of the language used comes within the latter classification—opinion—or whether a part comes within the former—false representation. The requirement of the law being that the statement must be sufficient to influence conduct, the statement, though partaking of the nature of an expression of an opinion by way of commendation of the subject matter of a proposed contract, yet may come within the above requirement, when made by one having superior position and

information, and being sufficient to influence conduct rendering the person making the same liable for the misrepresentation.³

A representation is false in contemplation of law as well as in morals if it is false in a plain, practical sense, that is, if it would be apt to create a false impression upon the mind of an average man, and constitute a material inducement in the transaction.

9. *Circumstances may establish falsity.* Knowledge of the falsity of a representation found to be false, and the purpose and intent with which the same may have been made, need not be proved by direct evidence, but may be inferred from the facts and circumstances appearing in the evidence. That is, if one stands in a peculiar situation in regard to the facts, the same are specially within his reach and knowledge, and the falsity being established, the jury may reasonably infer that he had knowledge of the falsity, and that he intended to deceive, and it is not incumbent upon the party with whom he dealt to prove knowledge by direct evidence.⁴

Now, gentlemen, in the light of these instructions you will determine whether the statements were false representations in the light of and within the meaning of the law as given you in these instructions. If you find that they are not, you will at once find in favor of plaintiff and proceed to consider the question of damages. But if you find that they were false representations, you will then proceed to determine whether they were material in the transaction, and whether defendants relied upon the same to their disadvantage.

10. *Must be material and relied upon.* The representation must have been material, that is, it must have operated as one of the inducing causes in influencing the action of defendants in making the contract.

And the representation must have been relied upon and acted upon by defendants to their injury to operate as a defense in this action. The law will not take notice of the false repre-

³ *Wilson v. Nichols*, 72 Conn. 173.

⁴ 26 N. Y. 117, 53 Ala. 153, 10 Cush. 392.

sentation if it had no material influence upon the action of defendants. The only question upon this point is whether the representation made by plaintiff was adequate to influence, and did influence defendants, not whether it was the sole inducement to the action taken; if it was sufficient to influence defendants to some real extent, that is enough. The law does not undertake nicely to measure the extent of influence.

The jury will look to all the evidence bearing on this point, consider the nature of the representation itself in the light of the nature of the transaction, the situation of the defendants, their desire in the matter, their knowledge, if any, of the customs and course of business of those undertaking to supply persons with pea viner machines, in letting them out to their customers, the ability of defendants to secure such machines. And the jury may look to the facts and circumstances occurring subsequently to the making of the contract, to the conditions and circumstances connected with and surrounding the cancellation of the contract, and the causes operating upon the minds of the defendants in the cancellation of the contract with plaintiffs.

The defendants claim that they did not learn of the alleged falsity of the statements and representations until some time after the contract was made. Nevertheless if they were false, and defendants believed them, and relied upon them, in whole or in part, that would be sufficient.

If you find that the representations were false, that they were material, and that the defendants relied in whole or in part upon the same, then your verdict should be for the defendants. But if you find that defendants did not rely upon the representations, even though they were false, their mere falsity, without reliance thereon, would not operate to discharge them from liability in this action.

Now, gentlemen of the jury, if the falsity of the statements of plaintiff, as false representations in law—as defined and explained to you in these instructions—and reliance thereon by defendants, are not established by a preponderance of the evidence, your verdict must be for the plaintiff. And in such case you will award plaintiff such compensation by way of

damages as will justly compensate it for the breach of the contract entered into by the parties.⁵

⁵ The Pillmore-Anderegg Co. v. Crites, et al., Franklin Co. Com. Pleas, Kinkead, J. Affirmed by Circuit Court.

Sec. 1804. Fraud in sale of stock in proposed company.

Rather complete charge embracing:

1. *Burden of proof.*
2. *Degree of evidence required.*
3. *Proof of intent and purpose—Circumstantial evidence.*
4. *Declarations—Consideration by jury.*
5. *Failure of party to offer evidence or make explanation naturally to be expected of him.*
6. *Failure to call witness.*
7. *Jury may reason from probabilities.*
8. *Failure of party to recollect important facts.*
9. *Fraud defined and explained—Act capable of two constructions, one fraudulent, another not.*
10. *Must be relied upon.*
11. *Representation must be to a material fact.*
12. *Must be past or existing fact.*
13. *Puffing.*
14. *Promises—When fraudulent—When not.*
15. *Must be relied upon.*
16. *Knowledge of complainant—His duty to be prudent and careful.*
17. *Whether written contract of previous representations relied upon.*

1. *Burden of proof.* The sole question is whether fraud was practiced or not. The court instructs the jury that fraud is never presumed, but must be proved, to entitle a party to relief upon the ground that it has been fraudulent, and the presumption of law is that the business transactions of every man are done in good faith and for an honest purpose; and anyone who alleges that they are done in bad faith, or for a dishonest purpose, takes upon himself the burden of proving by specific acts and circumstances tending to prove fraud, that such acts were done in bad faith.

2. *Degree of evidence required.* The degree of evidence is like that prevailing in ordinary civil actions, it being necessary for plaintiff to establish his claims by a preponderance of evidence, which is the greater weight of credible testimony.

3. *Proof of intent and purpose—Circumstantial evidence.* The act or acts charged, involving the question of intent and purpose with which it is claimed that the defendant did the thing alleged, the court states to the jury that this may be made out either by direct and positive testimony, or it may be shown by circumstantial evidence as well. Facts and circumstances may be shown from which the inference of fraud which is alleged, may be drawn by the jury. Fraud may be made to appear by marshalling the circumstances surrounding the transaction by deducting therefrom the fraudulent purpose, when it may reasonably be drawn therefrom. If the circumstances which are proved by a preponderance of the evidence are such as to warrant the jury in believing that the fraud charged has been committed, they may so find.

In ascertaining the purpose and intent of the defendant the jury may consider the conditions respecting the lands in question, and the title thereto, at the time the representations were claimed to have been made; you may consider the written contract of subscription which was prepared by the defendant, as well as all other documentary and other evidence.

4. *Declarations—Consideration by jury.* It is within the province and duty of the court, without any inference that the court is in any degree expressing an opinion in the matter, to say to the jury that evidence of oral declarations of parties should be received with caution; the jury may consider the liability of the human mind to err in recollecting and repeating statements and declarations made by persons; the jury may take into account the fact that such evidence is sometimes subject to imperfection and mistake, because the party making the same may not have clearly expressed his meaning, or the witness may not have properly understood him; and it may happen that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement or declaration

completely at variance with what the party actually did say. Such evidence, when clearly proven is entitled to as much consideration by the jury as any other. It is within the sole province of the jury to weigh such evidence and to give it such consideration to which it is entitled, in view of all the other evidence in the case. It is the duty of the court simply to state to the jury that such evidence should be received with great caution and scrutiny.

5. *Failure of party to offer evidence or make explanation naturally to be expected of him.* Where evidence tends to fix a liability on a party who has it in his power to offer other evidence which, if there is in fact no liability, would naturally be in existence and within the power or control of the one sought to be charged, and whose interests it would naturally be to produce it, and without satisfactory explanation, he fails to do so, the jury may draw such inferences therefrom as its judgment may warrant. It is an inference of fact for the jury and not a presumption of law.¹

6. *Failure to call witness.* The general rule is that a party is not to be prejudiced by his failure to call a witness who is equally available to the other party.²

7. *Jury may reason from probabilities.* Juries may often reason according to probabilities, drawing an inference that the main fact in issue existed, from collateral facts not directly proving, but strongly tending to prove its existence.³

8. *Failure of party to recollect important facts.* Where a party testifies to an important transaction in his own interests as well as in the interests of others, which may have been attended by circumstances calculated in the opinion of the jury to make a strong impression, but such party fails to recollect and testify to matters which the jury may believe if they had been answered might have had a material bearing on the questions at issue, the jury may make such inferences

¹ Moore on Facts, secs. 563, 564.

² Moore on Facts, sec. 567.

³ Moore on Facts, sec. 566.

therefrom as in its judgment it deems proper and warranted by the facts and circumstances shown by the evidence.⁴

9. *Fraud defined and explained—Act capable of two constructions, one fraudulent, another not.* Fraud is not to be presumed; on the contrary the law presumes that all men are fair and honest, that their dealings in good faith, and without intention to defraud. I now further state to you that where a transaction is called in question which is equally capable of two constructions—one that it is fair and honest and one that it is dishonest—then the rule of law in such case is that the fair and honest construction must prevail, and the transaction called in question must be presumed to be fair and honest.⁵

10. *Must be relied upon.* If one represents a fact as true to another which he knows to be false, and makes the representation in such a way, and under such circumstances as to induce a reasonable and prudent man to believe that the matter stated is true, and the representation is meant to be acted upon, and the person to whom it is made, believing it to be true, acts upon the faith of it, and suffers damage thereby, this is fraud sufficient to sustain an action for deceit.

11. *Representation must be to a material fact.* A misrepresentation to be fraudulent must be as to a material matter of fact; it must be false, it must be known to be false by the party making it, or it must be made recklessly without any knowledge of its truth, and as a positive assertion; it must be relied upon by the person to whom it is made; it must be made with the intention that it be acted upon by the party to whom made, and constitute the inducement to enter into the transaction; it must work injury or result in damages to the person relying thereon. If all these circumstances concur, they constitute fraud. The absence of any one of them is fatal to recovery.

12. *Must be past or existing fact.* To constitute fraud the misrepresentation complained of must have been as to a fact, either a past fact or an existing fact.

⁴ Moore on Facts, sec. 830.

⁵ Schraeder v. Walsh, 120 Ill. 410; Hill v. Reifsnider, 46 Md. 555; Tompkins v. Nichols, 53 Ala. 197.

13. *Puffing.* What is ordinarily understood as puffing is not fraud; that is, undue commendation not amounting to actual misrepresentation of past or present material facts does not amount to fraud.

Such boastful assertions, or highly exaggerated descriptions or claims do not amount to fraudulent misrepresentations or deceit. An expression of opinion or belief is not a proper representation of fact, and though false, does not amount to fraud and is not actionable.

14. *Promises—When fraudulent—When not.* The test of deception and fraud being a misrepresentation of an existing or past fact or transaction, an engagement or promise to be fulfilled in the future is not a representation. A promise, or the statement of something to be done in the future, though fraudulently made, even with no intention of performing the same, will not ordinarily and in the absence of peculiar circumstances rendering it otherwise, render the one making them liable. On the other hand, there may be circumstances under which representation of things to be done in the future—which are of the nature of promises, may be actionable.

For example, where representations and promises are made that certain things will be done in the future, and are so made in connection with and as part of false representation of past and existing facts, and concomitantly therewith, and they are of such nature as to form and become an essential and material part of the representation of the past or existing fact, so that the latter representation would be unavailing as an inducement without the fraudulent promise to the one to whom they are made to act thereon, and the alleged fraudulent promise constitute such a material inducing cause in the transaction, as to be and constitute a material part of the device or medium through which the fraud is committed, and there is no intention to perform or carry out such promises, then they may, in connection with the representation of the existence of past and existing facts, constitute actionable fraud.

15. *Must be relied upon.* If the representations were false, to warrant recovery by plaintiff it is incumbent upon him to

show that he relied upon the alleged false representations, or any one of them, as a material inducing cause in the signing of the subscription contract and in the payment of the money. It is not necessary that plaintiff should have relied exclusively upon defendant's statement, that they should have been the sole inducement to doing the act complained of, or resulting in his damage. It will be sufficient if such representations if they were made and were false, or any one of them, exerted a material influence upon his mind, although they constituted only one of several motives which acting together produced the result.

16. *Knowledge of complainant—His duty to be prudent and careful.* If a person to whom a representation is made knows that it is false, he can not treat the same as a fraud for any purpose, for a man can not rely on the truth of a representation which he knows to be false.

The law exacts of anyone who claims that he has relied upon and has been misled by alleged false representations, that he shall himself have been prudent and cautious. This principle finds frequent application in sales and transfers of property which is open to inspection of both parties. And there is no reason why it should not be applicable to this transaction, even though the property may not have been within reasonable opportunity of inspection, and though the defendant have had superior knowledge of conditions.

The complaining party, the plaintiff here, in an action of deceit must show that he has been prudent and careful in his understanding and ascertainment of the facts and especially in reading and signing contracts which may contain statements of alleged facts inconsistent or at conflict with the representations claimed to have been made and relied upon; it is incumbent upon him to show that he has not been misled through any fault or neglect on his part. He must show that he has not omitted to exercise ordinary care to guard against deception and fraud, except where he may be thrown off his guard, or where he has been led to do so by the other party.⁶

⁶ Kinkad, Torts, sec. 732, 91 Ill. 343.

17. *Whether written contract or previous representations relied upon.* When a contract is prepared and signed by parties as a result of previous negotiations and representations between them which is intended to constitute the contract which is to be made as a result and embodiment of their agreement and contract, and the party who is complaining that he was induced to make it and to perform it on his part by means of previous false representations, read the contract, and if the contract contains statements of facts at variance with the previous false representations of which he complains, the jury may make such inferences therefrom as its reason and judgment suggest touching the question whether the plaintiff relied upon the contract or whether he relied upon the alleged false representations. If the conduct of plaintiff in signing the subscription contract and the payment of his money was not influenced by the false representations, if any were made, if he was informed of the real facts of the California project, or if he acted solely on the written contract, and upon the statements and promises in paying his money, and not to any extent upon the alleged false representation, he can not in that event recover.

But the jury is instructed that it is not essential to recovery by the plaintiff, that it shall appear that he relied upon each and all of the alleged false representations. If he relied upon one, and acted upon that, it would be sufficient.

It is not disputed that there is an alleged false representation of an alleged existing fact claimed to have been made as to which the written provisions of the contract are silent. If the jury believe that there was a material representation, falsely made, independently of the facts contained in the written contract which you may, or may not believe to be sufficient to put him upon his guard as to the actual facts, and you believe that he may have been negligent in this respect, and you may infer that he relied upon the contract rather than upon the alleged representation, you will consider whether the other false alleged representation, as to which the contract is silent, was or was not made, and if it was made, whether plaintiff relied upon it to his damage.

If you find that the plaintiff in performing his part of the contract did not rely upon any alleged false representation or representations, then he can not recover.

To entitle the plaintiff to a verdict at your hands he must not only show by a preponderance of evidence that the representation or representations were made, that the same were false, and known to be so by defendant, and that plaintiff relied upon them to his damage.

If you should find any of the alleged representations were made by defendant, that they were false, and known to be so by him, or that they were recklessly made by the defendant without knowledge, that they were relied upon, to his damage, your verdict should be for the plaintiff. In such case you should assess to plaintiff such damages as you may find him to have sustained, not beyond the amount claimed in his petition.

The measure of the damages which plaintiff may have sustained, if you find in his favor, would be the difference between what plaintiff received, and what he paid to the defendant. In considering what plaintiff received, the jury is instructed that the plaintiff had the right to decline to receive the stock tendered him, which he did as the undisputed evidence discloses. I am unable to state to you gentlemen whether he legally or equitably is entitled to any interest in any property or not because there is no evidence here upon which the court may act in this matter. I can only say that if you find that the plaintiff received nothing for his money, the measure of his damages would be the amount of money so paid by him to the defendant with interest thereon at six per cent. from —.

Now gentlemen, if you find that defendant made no material misrepresentation or misrepresentations to the plaintiff, as claimed, or if you find he did make them, or any one of them, that the plaintiff became aware of the falsity of them, or ought to have been put upon his inquiry and knowledge, and that he relied upon the terms and conditions of the contract, then your verdict should be for the defendant.⁷

⁷ Peirano v. Westwater, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1805. Fraudulent declaration of dividends by directors of corporation—Action against directors for loss by purchaser of stock.

1. *Fraud—Burden of proving.*
2. *Intent in fraud—Wrongful conduct supplies.*
3. *Fraud defined—Knowledge of falsity, actual or imputable, essential.*
4. *Same—Jury to determine whether statements made knowingly or recklessly.*
5. *Same—Fraudulent dividend—Duties of directors of corporation—Care required.*
6. *Same—When directors not chargeable with knowledge of books.*
7. *Same—Directors voting or assenting to declaration of dividend liable—When—The statute making dividend unlawful when.*
8. *Same—Liability of directors for acts of manager of corporation.*
9. *Same—Misrepresentation to be fraudulent must be material and relied upon.*
10. *Same—Measure of damages.*

1. *Fraud—Burden of proving.* Fraud is never presumed, but must be proved by a preponderance of the evidence; the presumption of law is that the business transactions of every man are done in good faith and for an honest purpose, any one who alleges that such acts are done in bad faith, or for a dishonest purpose takes upon himself the burden of proving by specific acts and circumstances tending to prove fraud, that such acts were done in bad faith.

The defendant is entitled to the benefit of this presumption in the consideration of this case until the jury find from the evidence that such presumption has been overcome.¹

2. *Intent in fraud—Wrongful conduct supplies.* While intent is an ingredient of fraud, according to the definition just given, the jury is instructed that where the party or parties charged, have failed to exercise ordinary care sufficient to learn or know the truth or falsity of the representations complained of, such

wrongful conduct supplies the intent essential to constitute fraud.

To enable the jury to apply this legal rule as to fraud to the facts as you may find them from the evidence, your attention is directed to the undisputed evidence that defendants were directors of the — Company; that as such they declared a dividend, etc. The circumstances under which the dividend was declared, the justification therefor, and the facts and circumstances relating to the sale of stock to C. are in dispute, and the ultimate facts concerning these transactions are for you to decide.

It is charged that the dividend was fraudulently declared, when the company was insolvent, for the purpose and intent to deceive the public and plaintiff in the purchase of stock; that this fraudulent representation together with other fraudulent representations as to the condition of the company were made by defendants to plaintiff with intent to defraud him and to induce him to purchase the stock.

The defendants claim that they did not know that the company was insolvent and that it could not legally declare a dividend, and that they had reasonable ground to believe that the company was solvent and had the right to declare the dividend, that as directors they acted prudently as ordinarily prudent persons, etc.

The jury will determine the fact, etc.

3. *Fraud defined—Knowledge of falsity, actual or imputable, essential.* A fraud consists in obtaining an undue advantage by means of some act or omission which is unconscientious or a violation of good faith; the act or omission must be willful; in other words it must be knowingly and intentionally done.

There can be no fraud, or misrepresentation without some moral delinquency; there is no actual legal fraud which is not also a moral fraud. This immoral element consists in the necessary guilty knowledge and consequent intent to deceive, sometimes designated by the technical term *scienter*. No misrepresentation is fraudulent in law, unless it is made with actual

knowledge of its falsity, or under such circumstances that the law must necessarily impute such knowledge to the party at the time it is made.

A party making an untrue statement, having at the time no knowledge whatever on the subject, and no reasonable grounds to believe it to be true, is guilty of fraud, and his claiming that he believed it to be true can not remove the fraudulent character. A definite statement of what the party does not know to be true, where he has no reasonable grounds for believing it to be true, will, if false, have the same legal effect as a statement of what the party positively knows to be untrue.

Nothing short of fraud will sustain an action like this. Fraud is proved when it is shown that a false statement or representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, without observing ordinary care in learning whether it be true or false. To prevent a false statement being fraudulent, there must be an honest belief in its truth, found upon reasonable ground, such as would warrant a reasonably prudent person, under the circumstances—considering his duty in the position which he occupies—to believe in the truth of the statement.

4. *Same—Jury to determine whether statements made knowingly fraudulent or recklessly so.* It is for the jury to determine whether defendant made the alleged misrepresentations knowingly, or without reasonable ground to believe in their truth, or whether the statements were made recklessly with no knowledge of the truth. You will also determine whether defendants had actual knowledge of the insolvency of the corporation, and its ability to declare a dividend.

If the jury find that the defendants did not have actual knowledge that the dividend was fraudulently declared, it will then be your duty to consider the conduct of the defendants as directors so as to determine whether they believed that the company was solvent and had the right to declare the dividend, and whether such belief was founded on reasonable grounds.

If you find that they had actual knowledge of the alleged fraudulent dividend, there would then be no occasion to consider the grounds of belief in the solvency of the corporation.

5. *Same—Fraudulent dividend—Duties of directors of corporation—Care required.* There is a distinction between the care required of directors of a commercial corporation and that exacted of a banking corporation, due to the difference in the character of the business.

Directors of a corporation are what are termed in law as mandatories; that is, they serve without compensation, and for this reason the measure of their responsibility is varied and lessened. Directors who serve without compensation are not expected to give as much time, care and attention to the business of the corporation as if they were being paid for their services.

Directors of a commercial corporation whose services are gratuitous, and whose duties are to attend meetings of the board of directors, and to hear reports of officers and committees and to such other matters relating to the general policy of the business of the corporation, owe, and are bound to observe such care as the nature of the business reasonably requires, such care as directors of such corporations are ordinarily accustomed to exercise under similar circumstances and conditions.

Ordinary care means that degree of care which persons of ordinary prudence ordinarily exercise under similar circumstances.

Directors of such corporations from the very nature of things can not give such time and personal supervision to the affairs of the corporation, as they would to their own business, but must place the active management of the business in the hands of persons specially designated for that purpose. Directors of corporations in such cases can not be held as insurers of the fidelity of its agents whom they have appointed, and can not be held for false reports and representations made by such agents, or for false entries in the books of the corporation, unless the failure of such directors to learn and know the falsity of such reports, entries and representations are the consequence of or are due to their failure to observe such care, prudence and fore-

sight as would ordinarily be necessary to be observed in such cases, or as would be reasonably necessary to enable them to learn and know the truth or falsity thereof. Such directors are required to exercise such care as ordinarily prudent and diligent men would exercise in order to reasonably learn the truth of any reports or representations made by their officers.

6. *Same*—*When directors not chargeable with knowledge of books.* The control and custody and the supervision of the books of accounts of the corporation may be properly confided to the officers and agents of the corporation, by the directors. And where the latter have acted in good faith and with ordinary diligence in the general supervision of the affairs of the company, and have been unable to observe the true condition of the corporation as shown by its books and records, they are not chargeable with knowledge of all the affairs of the corporation, as shown by its books and papers; they are not, under such circumstances, charged with knowledge of the falsity of entries in the books, or with the falsity of any reports falsely made to them by their officers and agents. Their position does not require them to devote themselves to the details of the business, or to look with suspicion on the conduct of their officers and agents; they have a right to assume that they are honest and faithful, where no circumstances transpire to excite doubt or suspicion. * * *

If the jury finds that defendants had no knowledge of the falsity of the false representations and false dividends alleged in the petition, and had no reasonable ground to disbelieve the truth thereof your verdict should be for the defendants, etc.

That is, if you find that they had no knowledge of the falsity of the representation, and had on the contrary reasonable ground to believe in the solvency of the corporation, and the legality of the dividend, and in the truth of the alleged misrepresentations, your verdict should be for the defendants.

But if you find that defendants had actual knowledge of the falsity of the dividends as well as of the alleged misrepresentations, or if they had no such knowledge, and had no reasonable ground to believe in the truth thereof or in the validity of the dividends, etc., your verdict should be for the plaintiff.

If you find that there was any fact or circumstance concerning the financial condition of the corporation and the declaration of the dividend, or either of them, which would be sufficient to put a reasonably prudent and careful man acting as a director of a corporation, as an ordinarily prudent person would act under the circumstances, or such as would cause him to entertain a doubt or suspicion whether the corporation could lawfully declare the dividend, this should be taken into consideration with other facts and circumstances in determining the question, etc.

7. *Same—Directors voting or assenting to declaration of dividend liable, when—The statute making dividend unlawful when.* Directors of a private corporation, which is in fact insolvent and which has no surplus, who vote for or assent to the declaration of a dividend on the capital stock thereof, for the fraudulent purpose of deceiving persons having no knowledge or information of the financial condition of such company, and to induce such persons to purchase stock in such corporation; or who by false representations of the financial condition of such corporation, or by false statements of its financial condition, and of the fact that it is paying dividends on its capital stock, thereby induce persons to subscribe for and purchase its stock on the faith of such fraudulent act or false representations are liable to such persons if they rely and act thereon for any loss or damage thereby sustained by them. In order to hold directors of such corporation liable for such fraudulent act and false representations, it must be proven that they voted for or assented to the declaration of such dividend, and made, or were personally implicated in making or holding out such false representations, and that such directors declared and published the fact of such dividend, knowing that such corporation was then insolvent, or, knowing that such representations were false or that they did so under such circumstances as will warrant the jury in finding that such directors by the exercise of ordinary care and prudence would have known that such corporation was insolvent, or that such representations were false. The

declaration of the dividend, and the representations must have been made with the intent to deceive, and that plaintiff must have been deceived by them, and must have acted and relied upon them.

The statutes of this state (sec. —) provide that it shall be unlawful for the directors of any corporation organized under the laws of this state to make dividends except from the surplus profits arising from the business of the corporation. In the calculation of the profits previous to a dividend, interest then unpaid, although due, on debts owing to the company, shall not be included. In order to ascertain the surplus profits from which alone a dividend can be made, there shall be charged in the account of profit and loss, and deducted from the actual profits all expenses paid and incurred both ordinary and extraordinary, attending the management of the affairs and the transaction of the business of the corporation. There shall also be deducted from the actual profits, interest paid or then due and accrued on debts owing by the corporation. There shall also be deducted from the actual profits, all losses sustained by the corporation, and in the computation of such losses, all debts owing by the corporation shall be included which shall remain due without prosecution, and no interest having been paid thereon for more than one year, or which judgment shall have been recovered and shall have remained for more than two years unsatisfied, and on which no interest shall have been paid during that period; and no such corporation shall advertise a larger amount of capital stock than has actually been subscribed and paid in; and shall not advertise a greater dividend than what has been actually earned or credited or paid to its stockholders or members.

Hence, I charge you that a dividend is that portion of the profits and surplus funds of the corporation which has been actually set apart by a valid resolution of the board of directors for distribution among the stockholders according to their respective interests, in such sense as to become segregated from the property of the corporation, and to become the property of the shareholders distributively.

It is the excess of its cash and other property on hand over and above its liabilities.

The assets of a corporation consist of the stock in trade, cash, and all available property belonging to the company.

8. *Same—Liability of directors for acts of manager of the corporation.* If the jury find that P., manager and in control of the business, was the only one of the defendants who knew that the dividend could not be rightly and legally declared and paid, and that he misrepresented the books and condition of the company to the other directors, and the other defendants relied upon such misrepresentations in good faith, and could not by the exercise of ordinary care and prudence have discovered the falsity of such representations, and had reasonable grounds for believing that the dividend could be rightly and legally declared, then they could not be held responsible for any fraudulent misrepresentations made by P. to plaintiff, and your verdict in such event should be returned only against P.

But if you find that P. did reveal and make known to the other directors and defendants herein the true condition of the books and of the details of the entries therein so far as was necessary to enable them to know whether the dividend could or could not be rightly and legally declared and paid; and if you are of the opinion that the defendants, by the exercise of ordinary care, considering their knowledge and intelligence, could have known whether such dividend could be rightly and legally declared and paid; and if they failed to observe ordinary care and prudence under the circumstances, and hence were without reasonable grounds for believing that such dividend could be paid, but that they nevertheless, did vote to declare and pay the dividend, your verdict in such case should be against all the defendants to whom P. revealed the condition of the company, and who voted to declare the unlawful dividend, if you find they did so, provided there was a common design and purpose on the part of all the defendants to increase the assets of the company by the sale of the stock after the payment of the dividend.

8. *Same—Misrepresentation to be fraudulent must be material and relied upon.* A misrepresentation to be fraudulent must be as to a material matter of fact; it must be fraudulent and false and must be relied upon by the person to whom it is made, and it must constitute an inducement to enter into a transaction, must work injury or result directly in damages to the person relying thereon, and the person to whom such misrepresentation is made must have a right to rely thereon.

If all these circumstances concur, then there is fraud, and the party thus injured is entitled to relief.

If the defendants fraudulently declared a false dividend, and fraudulently made false and fraudulent misrepresentations or statements to plaintiffs as claimed, but if the plaintiff did not rely on them in accepting the stock, but instead sought and obtained information concerning the financial condition of the company and the statements and facts with reference thereto from other sources, and then on his own judgment concluded to enter into the contract for the purchase of the stock, and if he took his chance as to the real condition of the company and the real value of the stock, then he may not recover.

But if plaintiff did rely upon such representations, and he had a right to rely upon them; if he acted upon the faith of them instead of upon his own judgment or information obtained from other sources, and he was damaged thereby, he may recover notwithstanding he may have made inquiries and obtained information from other sources.

9. *Same—Measure of damages.* The measure of damages is the difference between the value of the stock as it was represented to be, and its actual intrinsic value at the time of the purchase of it by plaintiff, which sum you should allow with interest, etc.

If the stock was worthless when plaintiff bought it, the price it was then represented to be worth, with interest, is the measure of damages. If on the other hand, the stock then had some intrinsic value, that value should be deducted from the value it was represented to have.¹

¹ *Converse v. Yaeger*, Franklin Co. Com. Pleas, Kinkead, J. Affirmed by Circuit and Supreme Courts.

CHAPTER CIII.

GAMBLING CONTRACTS.

SEC.

1806. Contracts for sale of grain to be delivered at future day.
1807. Fact that one party acts as commission merchant does not change relation.

SEC.

1808. Action for money lost by a person dependent for support upon the person losing money.

Sec. 1806. Contracts for sale of grain to be delivered at future day.

Where transactions on their face are purchases and sales of commodities by one party of and to another, the burden of proof rests upon him who asserts their illegality, on the ground that they are gambling transactions, to prove by a preponderance of the testimony that they are in fact gambling transactions; and to establish this, the facts and circumstances must be so convincing and strong that no other reasonable conclusion can be drawn from them.

Contracts are not presumed to be illegal; on the other hand, they are presumed to be legal until the contrary clearly appears. A contract for the sale of grain or other commodity, to be delivered at a future day, is not invalidated by the fact that it was to be delivered at a future day, or by the additional fact that at the time of the making of the contract the vendor had not the goods in his possession, or by the additional fact that at the time he had not entered into any contract to buy or procure the goods, nor by the further fact that at the time he had no reasonable prospect of procuring them for delivery, according to the tenor of the contract. In such case, if either party to the contract has the right to compel a delivery or receipt of the goods, it is a valid contract, although the parties

thereto thereafter settle and agree to close up the transaction by a payment of differences. Nor does the statute of Ohio apply to sales of grain or other goods for future delivery, where the only option is as to the time of delivery, within certain limits. The intent of that act is to prohibit transactions which are purely options to buy or sell, where there is no intention, but the contrary, upon the part of the parties ever to deliver or receive and pay for the goods. It should appear, however, in order to uphold a contract for the sale and delivery of grain at a future day or time for a price stated, that it was the purpose of the parties that there should, in fact, be a delivery and receipt of the grain. If made with a *bona fide* intention to deliver the grain and to receive and pay for the same, it is valid in law.

(a) *Intention of the parties governs.*

It is the intention of the parties at the time the contract is entered into that gives character to the same. In other words, it is the key to the real transaction by which it should be tested. What was the intention of the parties to this contract at the time it was made in respect to an actual delivery and receipt of the goods contracted for? An understanding between the vendor and vendee, at the time the contract is made, that the goods shall not be delivered or received, but merely to pay and receive the difference between the price agreed upon and the market price at the time named for its delivery, brings the transaction within the statute, and it is void. Nor does it matter what form the parties gave to their contracts. They may be painstaking and legally exact in this respect. On its face the contract may be, in all particulars, legitimate and regular. As the Supreme Court of the United States declared in the case of *Irvine v. Willard*, "Gambling is none the less such because it is carried on in the form or guise of legitimate trade." And, in the language of another high authority, I charge you that however formal and correct a contract may be on its face, yet if this formality is resorted to as a mere disguise, and the real understanding and agreement between the parties thereto at the time it was entered into was that it should not be performed according to its tenor,

and both the parties do not intend an actual delivery of the article bargained for, but merely to settle the differences between the price agreed to be paid for the article and the market price at the time fixed in the contract for its delivery, it is a gambling transaction within the meaning and intent of our statute, and is also against public policy and wholly void.

The secret intention of one of the parties to a contract that the grain shall not be delivered and received, but that settlement shall be made as already stated, is not sufficient to render the contract invalid; it must be the mutual understanding and agreement of both the parties thereto. In short, I state it this way: If the intent and purpose of both parties to the contract is purely and nothing else but to wager on the rise or fall of the price of grain, and no delivery or receipt of the same is to be had, and not to deal in it *bona fide*, the transaction is a gambling affair, and is utterly void.¹

¹ Lester v. Buell, 49 O. S. 240.

Sec. 1807. Fact that one party acts as commission merchant does not change relation.

If you find that, in pursuance of directions from the defendants, or from their agent authorized in the premises, the plaintiff did, in his own name, make *bona fide* sales and purchases for future delivery for defendants, by which the parties to whom the plaintiff made such sales, or from whom he made such purchases, had a right to compel delivery of the grain bought and sold, or enforce a payment of damages for breach of contract, such transaction is not illegal as between plaintiff and defendants, although defendants never intended to deliver or receive the grain sold or bought, and although the plaintiff knew at the time of such intention. If, under the proof, you find the transactions valid as between the defendants and their vendors or vendees, such transactions are valid as between defendants and their broker, commission merchant, or agent. And if you find in this case that plaintiff acted merely as defendant's agent, whether he assumes to make the purchase or sale

as a commission merchant only, will not alter the relation of the parties, and whatever the transactions were, whether they were valid or not, plaintiff can not recover for his commission, and for the money advanced by him for the defendants under such circumstances that an agreement to repay will be implied.

If you find the transactions illegal and void, under the instructions which have been given you, and you further find that the plaintiff acted as agent in these transactions, and knew or had reason to know all about the illegal character of the same, and knowingly assisted the defendants in the advance of the money, and was acting in such agency to bring about the gambling transactions in which he advanced the money, and sought thereby to keep up and aid such transactions, and advised and procured the same to be done by himself or by Mr. C., and so acted in the premises as to be affected by the immoralities of the transaction, he can not recover. If he advised, aided and procured gambling transactions to be entered into by the defendants in these alleged grain deals, and was acting by himself or agents in carrying them on, and did it on purpose to gamble in grain in this way, and obtained from the defendants their money in illegal and gambling affairs, he is a principal in the commission of all the offenses.¹

¹ Lester v. Buell, 49 O. S. 240, and cases cited.

Sec. 1808. Action for money lost by a person dependent for support upon the person losing money.

You have heard the evidence in this case, and the arguments of counsel. It now becomes the duty of the court to charge you as to the law which will govern you in your deliberations. All questions of fact are for the jury, that is your exclusive province. It is the province of the court to charge you as to the law of the case, and you will be governed by the law given you by the court, whether it may agree with the individual opinion of any one or more of you or not. Therefore, in your jury room no one will advance any proposition of law at variance with that given you by the court.

The plaintiff sues the defendant here asking for a judgment for \$—— lost by her son, she claiming that it was lost by him in gambling, together with exemplary damages in the sum of \$——, making a total of \$——, for which she asks judgment at your hands.

The statute involved in this case, sec. 5967, provides, in substance, as follows: That a person who loses any money at gambling may recover the same, or any person who is dependent for support upon such person may sue for and recover from the person receiving the money any such money that is so lost.

The petition in this case alleges that the plaintiff was entitled to the earnings of her son. The court, however, instructs the jury that as the son was at the time complained of not a minor, but of full age, that she is not entitled to recover on that ground, that she can only recover, if at all, upon the ground that she was entitled to the support of her son under the statute.

The court can hardly interpret the meaning of this statute which reads that "A person dependent for support upon the person so losing the money," more definitely and certain than the language itself imports. Counsel in argument have interpreted the statute as embracing one who is entitled to support in any degree. The language is plain, and the court will not undertake to determine its meaning any further than its language indicates to the ordinary intelligent mind. It is a simple question of fact for the jury to determine from the evidence whether plaintiff was in fact dependent for her support upon her son; not necessarily whether there was a contract, but whether plaintiff had other means of support, from her own exertions or from her own means; whether the son did or did not at and during and prior to the times mentioned in the petition actually support the plaintiff, or whether he did not. This is the question of fact which lies at the basis of this case, and it is your sole province to decide it.

To warrant a recovery on behalf of the plaintiff she must establish by a preponderance of the evidence that she was at the time mentioned in her petition, and at and prior thereto,

dependent upon her son, whom it is claimed lost money, for her support. If you find that plaintiff was not at the time stated in the petition dependent upon her son for support, that would be an end to the case and you need not further consider it.

The jury must find that plaintiff was dependent upon her son for support, and that he lost the money by gambling, which finding must be supported by a preponderance of the evidence, that is by the greater weight thereof. If the evidence is evenly balanced between the parties, there is not then a preponderance thereof, and in such case your verdict should be for the defendant.

The jury is the sole judge of the credibility of the witnesses. The court has nothing to do with the question of credibility of witnesses except to point out matters which the jury may consider. You may adopt such tests as in your judgment seem best applicable to the facts and circumstances developed in the evidence.

Before the plaintiff may recover in this case she must prove to you that her son did lose some money at gambling. If he did not lose money at the time and place alleged by her, she may not recover. The law places the burden of proving this upon the plaintiff, which she must do by the greater weight of the evidence as before explained. In other words, you are not permitted to conjecture or guess what his losses, if any, were, but it must be proven to you by the greater weight of the evidence. Verdicts must be rendered upon sworn testimony which proves the material allegation of the petition by the degree of evidence already stated.

CHAPTER CIV.

GIFT.

SEC.

1809. Gift *inter vivos*.

1810. What constitutes valid gift.

SEC.

1811. Retaining dominion over gift.

1812. Gift of mortgage or money
represented by mortgage.

Sec. 1809. Gift *inter vivos*.

A gift *inter vivos*—between the living—such as is claimed here is the act of the owner of property of transferring its ownership—its title and possession to another. It is a contract which takes place by the mutual consent of the giver, who divests himself of the thing given in order to transmit the title to the donee gratuitously, and the donee is the person to whom it is given, who actually accepts and acquires the legal title to the subject of the gift, whatever it may be—in this case being a claim of money paid upon a mortgage upon real estate, the title to which stood in the name of the plaintiff and her husband at the time of the payment.

Sec. 1810. What constitutes valid gift.

To constitute a valid gift, the purpose of the donor—the giver—to make the gift must be established by the requisite degree of evidence—that is, a preponderance of the evidence the same as in ordinary civil cases, and the gift must be complete by either actual, constructive or symbolic delivery, without power of revocation on the part of the donor or the giver. A clear and unmistakable intention on the part of the donor or giver to make a gift of his property is an essential requisite of the gift. Whether J. B., Sr., intended to make a

gift as claimed, or whether he did not so intend is to be gathered from all the evidence, and may or may not, as the judgment of the jury suggests, be gathered from his declarations or from his acts, whatever they were, appearing in the evidence, if indicative of the fact of having made a gift or not.

The intention to give must be consummated and carried into effect by acts which the law requires to divest the donor and invest the donee with the right of the property—complete and unconditional delivery is essential to the perfection of such a gift; if the donor or giver retains dominion over the subject of the gift, or if he retains a chance to withdraw, or to change his mind, there can be no legal and perfect donation.

Sec. 1811. Retaining dominion over gift.

Now when you are considering that rule as to retaining dominion over the subject of the gift, of course the jury must take into consideration the nature and character of the gift as claimed—in this case being money paid upon the mortgage, the mortgage having been cancelled on the paper itself, and a record of it having been made in the recorder's office.

Now as to this matter of retaining dominion over the subject matter, the court will instruct you later on as to the rights of J. B. Sr., in the event that you find from the evidence that he did not intend to make a gift.

The delivery required must be such a one as the nature and character of the thing claimed to be given shows it to be capable of. These are the essentials of a gift *inter vivos*, or among the living.

Sec. 1812. Gift of mortgage or money represented by mortgage.

The money having been paid by B. to the building and loan company when the title to the property stood in the name of plaintiff and her husband, and the mortgage having been cancelled on the mortgage itself and upon the records of the recorder's office, the jury will determine from these acts, and

any declarations which the deceased may have made, and all the evidence, what the fact was, whether or not there was a gift or whether it was not a gift; but I may say that absolute certainty is not possible, nor is it required in the determination of the facts by the jury. The jury are allowed by law to deal in what may be called probabilities. The question is whether it was probably a gift. If the evidence is evenly balanced between the parties, of course the plaintiff must fail upon the question of the gift. If it was the intention of J. B. Sr., at the time of paying the amount of the mortgage, as claimed by plaintiff, the payment and cancellation thereof on the mortgage and on the record, would, in such event, be a sufficient constructive delivery of the subject of the alleged gift. Now the court is not giving any opinion upon that matter at all, because it is left entirely with the jury, and the jury must deduce from all of the circumstances whether or no there was an intention to make a gift, the jury being the exclusive judges of the fact. The court merely states that if you should find from the evidence that it was his intention to make the gift at the time, then the court states as matter of law, that there would be a sufficient delivery by the cancellation upon the mortgage and upon the record without anything further being done. If, however, he paid this money on the mortgage without intending to make a gift to the plaintiff as claimed, but because of the admitted fact here that he held a second mortgage on the property, and that he paid the building and loan mortgage to protect his second mortgage, but under a mistake of his legal rights in the matter of preserving the lien of the mortgage for his own protection, he failed to take such steps that would on its face protect him in that matter, and if he did not intend in fact to cancel the lien of the mortgage but expected to retain it and preserve it for his own protection, but failed to do so in a legal manner, in such event he would, in law, be entitled to be subrogated in equity for the rights of the lien of the mortgage, and in such case there would of course be no gift.

Now it is a question for the jury to determine what his intention was, whether he did intend to pay that to protect his own interest, and whether he did make the mistake; whether he did not intend to have the mortgage cancelled, and whether he intended to preserve the lien. Those questions are entirely within the province of the jury to determine.¹

¹ Breen v. Breen, Franklin Co. Com. Pleas, Kinkead, J.

CHAPTER CV.

GRAND JURY.

SEC.

1813. A complete charge to grand jury. [Other suggestions.]

1814. Introductory.

1815. Origin of institution of grand jury.

1816. Grand jury to institute criminal proceedings as well as to guard against unjust accusations.

1817. Oath, and responsibility imposed thereby.

SEC.

1818. Special charge as to bucket-shops—Gambling in margins.

1819. Character of evidence to warrant indictment.

1820. Legal evidence only to be considered.

1821. Looking at guilt or innocence.

1822. Scope of inquiry.

1823. Secrecy must be observed—Another form.

Sec. 1813. A concise charge to the grand jury.

GENTLEMEN OF THE GRAND JURY—You have been summoned here to determine whether men should be accused with crime. It is the duty of the court to instruct you respecting your duty. Of course it is needless for me to say that you should observe the instructions.

It has long been a cardinal principle of law that no one shall be put on trial for a capital or infamous crime until he has been indicted by a grand jury. In earlier times the grand jury often stood as a barrier against unjust persecution. So should it now be the means, not only of bringing to trial persons accused of crime upon just grounds, but also to protect persons from unfounded accusations whether presented by legal officers or by partisan passion or private enmity.

There is no public purpose subserved in indicting men, when it appears to you that there can be no conviction according to the proof.

It is important that accusations be made against those appearing, upon an honest and impartial examination, to be

probably guilty of the commission of a crime. It is equally essential that unjust or unfounded accusations be not made against anyone.

The oath administered to you contains some essential principles which should control you in your deliberation. The taking of an oath by a grand juror means that he shall observe it. A juror who does not honestly and conscientiously keep his oath can not be a worthy citizen. The jury and judge constitute the court, and the duties resting upon each must be properly performed.

Your oath contains an appeal to your conscience that you keep secret what takes place in your presence in the grand jury room. The purpose of this is plain. You may have accusations brought before you, which, after examination you will find unfounded, and return no indictment. The laws of decency demand that you shall not individually slander your brethren. Then how much stronger should be the seal on your tongue in respect to what goes on in the grand jury room.

It is your imperative duty, gentlemen, to keep rigidly in confidence the counsel of the prosecuting attorney, his assistants, your fellow jurors and yourselves, until you are compelled in a court of justice to reveal it. You are only allowed to make disclosures when called upon in a court of justice, which seldom ever occurs. The injunction of secrecy demands that you shall not communicate to any person what has been done in the grand jury room. It means that you are not at liberty to tell any person what has been said or done in the grand jury room, either by the prosecuting attorney, or by his assistants, or by your fellow jurors, or by yourselves. It would be as much of a violation of your oath if you should permit anyone to question you about the proceedings in the grand jury room, as it would be to voluntarily impart any information.

You should not permit anyone to suggest or ask you to vote for or against the indictment of anyone. If anything of that kind should occur, report it to the court. This is the only part of our legal machinery, in the administration of justice where

absolute secrecy is required. Accusing a person of a crime which may blast his reputation and cover him with ignominy, is a grave matter, and should not be done except for sufficient reasons and for the most momentous cause. The chief purpose of the grand jury is to have accusations of crime privately examined, so as to ascertain whether there is a probability of their truth, before giving them publicity in the form of an indictment. We find sometimes a class of persons who are eager to start criminal prosecutions upon inadequate evidence. Sometimes that may be from honest motives; sometimes from base, malicious and corrupt motives. If the grand jury were not required to keep secret their deliberations and what occurs in the grand jury room it is clearly evident that reputations may be injured or damaged.

There is also reason for the obligation of secrecy, which is that it may prevent anyone accused, from escaping justice. If it were possible for anyone who is likely to be charged by the grand jury with a criminal offense, to learn or know of the investigation by the grand jury or to know that they are to be indicted, opportunities would be afforded for their escape.

You understand that all charges of criminal offenses do not arise before the examination occurs, but that the grand jury itself may initiate investigation, and because of this fact, it is important that the rule of secrecy be observed. If this obligation of secrecy were not enjoined by law, and grand jurors did not keep it, there would be another way in which justice might be defeated. It would enable friends of those who were accused before the grand jury, to bring all possible influences to prevent the indictment.

It is therefore, obvious, gentlemen of the jury, upon these considerations, that this duty of secrecy although foreign to the law and its proceedings generally is absolutely necessary in the investigations of the grand jury, for the protection of the innocent and for the punishment of the guilty. It is not an idle obligation that you take to keep these matters secret.

Your oath also requires that you shall present no person through malice, hatred, or ill will. But at the same time it is

your duty to not fail to indict anyone who ought to be indicted, from either fear, affection, reward or hope thereof. You must in all of your deliberations and presentments, present so far as you are able, the absolute truth to the best of your skill and understanding. You must lay aside all feelings and prejudices which might in any way interfere with you in the strict and impartial performance of your duty as a grand juror. No grand juror has the right to permit his understanding or judgment to be influenced or controlled by any sort of feeling foreign to the matter in question; by any religious, social, or political bias, or personal feeling. No grand juror has a right to start a criminal prosecution to aid or defeat either side of a political, religious or personal controversy. Neither has any member of a grand jury a right to bring about an indictment of anyone for the purpose of gratifying his malice or the malice or hatred of any of his friends. If it should happen that any member of a grand jury should so violate his duties as to transgress these rules, it would degrade the high character of the grand jury.

The prosecuting attorney and his assistants are constituted by law the representatives of the state in all criminal prosecutions. It is their privilege and their duty to be present with the grand jury in its room, to present the accusations, to give information with relation to any matter that may be cognizable by the jury, to give advice touching any matter of law when required, and to examine the witnesses when they deem it necessary. It is their duty to instruct you touching legal matters with the utmost fairness and candor, remembering that they are in charge of a tribunal before whom only one side of a case can be fully heard. It is your duty to follow their instructions on matters of law, unless you are instructed to the contrary by the court. It is as much the duty of the prosecuting attorney to safely guide you in matters of law, pertaining to matters of evidence especially, as it is of the court. Hearsay evidence is too unsatisfactory kind of evidence, and therefore is excluded in courts. It would be more unjust and

harmful to regard or act upon this kind of testimony in the grand jury room than elsewhere. It will be the duty of the prosecuting attorney to advise you in such matters. No one but the prosecuting attorney, or his assistant, has a right to be present during your deliberations after the testimony is taken.

You are the sole judges, however, upon all the evidence that may be offered in support of any accusations of crime. Neither the prosecuting attorney nor his assistants have the right to advise you, or to hint or to intimate how you shall decide a question of fact. In the conduct of the examination of witnesses however, it should be the purpose of the prosecuting attorneys and their assistants together with the action of your body, to reject and not consider the incompetent testimony. The law makes it the duty of the prosecuting attorney merely to give you information, to interrogate witnesses, and to give advice upon any legal matters when required. You must understand and respect this power and duty of the prosecuting attorney, and in your deliberations you should cause no embarrassment to him or to yourselves by asking or receiving any advice upon anything other than that which the law authorizes. You are not so apt to remember this rule as is the prosecuting attorney. Therefore, I caution you particularly as to it.

It may happen in your deliberations that charges and accusations of crime may be made, and it may come to your knowledge that by calling other witnesses who have some knowledge of the transaction, the suspicion or charge may be cleared up. I regard it just as incumbent upon you to follow out this line of examination as any other that may come legitimately within the province of your examinations and investigations. At least twelve of the grand jurors must concur in the finding of an indictment, and when so found, the foreman shall indorse on the indictment, "A true bill," and subscribe his name thereon as foreman.

It is made the duty of the grand jury at each term of the court, to visit the county jail, examine its state and condition,

and inquire into the discipline and treatment of the prisoners, their habits and accommodations. You are required to report to the court in writing, whether the rules prescribed by the judges have been faithfully kept and observed, and whether any provisions of the law for the regulation of county jails have been violated, pointing out particularly in what such violation, if any, consists.

There is one crime with reference to which the statute makes it the duty of judges of the common pleas courts of this state, to especially charge the grand jury at every regular term thereof. It is the crime of operating bucket-shops, or gambling in margins. In obedience to this statute, I charge you to diligently inquire, investigate and true presentment make of all persons guilty of a violation of the provisions of the act against the so-called bucket-shop and margin gamblers.

Now, gentlemen, let me say to you that the statute has especially enjoined this duty upon the court, to give you special instructions regarding this matter. It is therefore as much your duty to actually, honestly, and impartially investigate and determine whether any violations of this law are being committed within the confines of this county, as it is made the duty of the court to especially charge you regarding this matter.

You, as well as the prosecuting attorney, have the right to require the clerk to issue subpoenas for witnesses to be brought before you to testify. You are at liberty at any time to call for further instructions from the court, although the instructions which the prosecutor and his assistants give you, will probably be sufficient for all purposes.

Your attention will be called to accusations of crime, by the prosecuting attorney, which come into this court from the police court and from justices of the peace, having been bound over to the grand jury by those courts.

You must understand, however, that your investigations are not confined to this class of cases, but that you have the power, and that it is your duty to take the initiative yourselves, and examine into any matters other than the class of cases coming up to you in the regular manner from the examining.

In making this original examination, you will be guided and governed by the injunctions heretofore given you.

Gentlemen, you will now retire to your room, and proceed as speedily as the nature of your work will permit, and in due time make your report to the court.¹

¹ Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1814. Introductory.

A grand jury is composed of not less than fifteen good and lawful men summoned from the county. An indictment is a written accusation of crime against one or more persons presented to and preferred by the grand jury upon their oath or affirmation.

Before you enter upon the discharge of your duties, it is incumbent upon the court to instruct you concerning them, and it is your duty to obey the instructions so given. An outline, an abstract, of your duties is contained in the oath which your foreman took and the rest of you took by adoption. You were sworn to diligence, secrecy, and impartiality; or, as has been summarized by another, your duty is to "inquire with zeal, hear with attention, deliberate with coolness, judge with impartiality, and decide with fortitude."

Sec. 1815. Origin of institution of grand jury.

It has long been a cardinal principal of English law, that no one shall be put upon trial for any capital or other infamous crime or felony, until he has first been indicted by a grand jury of the county in which crime was committed.

The institution of the grand jury is of very ancient origin. In the struggles and contests which arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name. It finally became an institution by which the subject was rendered secure against oppression from unfounded prosecutions. Drawing the same inspiration from our parent country, and from considera-

tions which gave to it its chief value in England, the grand jury with us is designed as a means, not only of bringing to trial persons accused of crime upon just grounds, but also as a means of protecting the citizen against unfounded accusations, whether they come from the representatives of our state, or be prompted by partisan passion or private enmity.

Sec. 1816. Grand jury to institute criminal proceedings as well as to guard against unjust accusations.

Constantly bear in mind the two fundamental principles (*ante*, 1813) lying at the basis of the institution of which you are now duly and legally impaneled as members, and charged with its responsibilities.

The one principle is as important as the other; neither is more binding upon you than the other.

It is highly important in the interests of society, that accusations be made against those appearing, upon an honest and impartial examination, to be probably guilty of the commission of a crime. It is just as essential in the interests of society that no unjust or unfounded accusations be made against anyone, as it is that well founded accusations shall be made against those who are guilty. The making of unjust accusations would tend to injure society almost as much as the just preferment of accusations would benefit society.

Members of a grand jury ought to be able to readily discover from those who appear before it, whether or not they are prompted by partisan or private enmity. Scrutinize carefully the testimony of any such persons.

Sec. 1817. Oath, and responsibility imposed thereby.

The oath as administered to you contains some of the essential principles which must control and govern you in your deliberation. There is no greater responsibility resting upon a member of society than there is upon one who takes an oath to perform a public duty. The taking of an oath by a grand juror means that he shall observe it to the same extent as the judge of the court observes his. A juror, be he petit or grand,

who does not honestly and conscientiously observe and keep his oath, is almost as harmful to society as are those who commit crimes. The responsibilities of grand and petit jurors are materially different.

Your oath contains an appeal to conscience in the presence of your God, that you shall keep secret what takes place in your presence in the grand jury room. The purpose of this injunction is plain and most commendable. You may have accusations brought before you which, after due examination and deliberation, you will find unfounded, and return no indictment. The laws of decency demand that you shall not individually slander your brethren. Then how much stronger shall be the seal upon your tongue in respect to what goes on in the grand jury room.

Sec. 1818. Special charge as to bucket-shops—Gambling in margins.

There is one crime with reference to which the statute makes it the duty of judges of the common pleas courts of this state, to especially charge the grand jury at every regular term thereof. It is the crime of operating bucket-shops, or gambling in margins. In obedience to this statute, I charge you to diligently inquire, investigate and true presentment make of all persons guilty of a violation of the provisions of the act against the so-called bucket-shop and margin gamblers. Now, gentlemen, our judges have been charging the grand juries at every session of court as to this matter for many years, but it seems to amount to nothing. Still there is constantly filed in our courts actions to recover money lost at this species of gambling, which are prolonged as long as possible by technical objections and are settled about the time they are reached for trial. The law should not be trifled with, nor the time of this court taken up with such cases. It is your duty to call some of these parties in and examine them.

I am reminded that I once read a book written by a distinguished moral philosopher who occupies a chair in one of our great universities, in which it was stated that the law gave

attention to the *small gambler*, but overlooked the *large gambler* who dealt in stocks and wheat on margins. This distinguished scholar had overlooked the statutes such as we have in Ohio and in other states, and especially was not informed that it was made a special duty of this court to charge grand juries respecting this class of *gambling*. And yet he is half right, because the law seems to be inoperative. We read in the daily newspapers within but a few days, that the chief of police sounded the death knell to the bucket-shops in Chicago. Let this grand jury see that the same evil is eradicated from this locality.

I do not see why any special stress should be laid upon one form of gambling by requiring a special charge as to the particular form, any more than upon another different way of getting another man's money by games of chance. In obedience to the law, however, I charge you that it is your duty to investigate and determine whether or not within the domain of Franklin county, Ohio, there are any persons, corporations, associations, chambers of commerce, boards of trade, co-partnership, or other person, who are keeping any bucket-shop office or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions, or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so bought, or of delivering the property so sold; or wherein is conducted or permitted the pretended buying or selling of such property on margins, or when a party buying any such property, or offering to buy the same, does not intend actually to receive the same if purchased, or deliver the same if sold.

Now, gentlemen, let me say to you that the statute has especially enjoined this duty upon the court, to give you special instructions regarding this matter. It is, therefore, just as much a part of your duty to actually, honestly, and impartially investigate and determine whether any violations of this law are being committed within the confines of this county, as it

is made the duty of the court to especially charge you regarding this matter. If we are going to get any results from this special injunction of the legislature, I charge you to not fail to comply with the directions of the court in this matter.

It is just as incumbent, however, upon the court to charge you that it is your duty to examine into any and all kinds of violations of our criminal statutes as it is in this particular one, which has just been called to your attention.¹

¹ Franklin County, Kinkead, J.

Sec. 1819. Character of evidence to warrant indictment.

It is not your province to determine in any case whether a person who may be accused of having committed a crime is really guilty. It is to determine whether there is sufficient evidence to put him on trial before a petit jury. Before you can find a bill, you ought to be satisfied that the evidence before you unexplained and uncontradicted would be sufficient to authorize a petit jury to convict the accused of the crime which is imputed to him. If the evidence only establishes a probability of guilt, that is not sufficient; but in determining this question, you have no right to assume that there will be evidence upon the trial of the case before a petit jury that would explain or contradict the evidence which has been offered by the state before you. You are to decide the question solely upon the evidence that is before you; and if it satisfies you that it is sufficient to warrant a petit jury in convicting, it is your duty to indict, otherwise not. The rule requiring sufficient evidence to convince beyond a reasonable doubt does not apply to the deliberations and conclusions of a grand jury.¹

¹ Code, sec. 7193, requires that the judge call attention particularly to the obligation of secrecy, and explain the law applicable to such matters as are likely to be brought before them.

Sec. 1820. Legal evidence only to be considered.

It is your duty not to listen to any testimony except that which is legal; that excludes hearsay, reports, rumors, or con-

jectures, but it is competent for you to consider any legal evidence which comes before you properly, whether it tends to excuse or exculpate the persons who may be under charge.

Sec. 1821. Looking at guilt and innocence.

Your duty even goes farther than this. While the design of the law is that the grand jury's investigation shall be one-sided, still, if in the pursuit of truth it is developed that there is evidence within reach of the grand jury that may explain away or qualify the charge under consideration, it is competent for you to send for that testimony. It is not right that any person should be indicted for an isolated fragment of any transaction, as has been well said. No innocent person should be indicted if there is evidence within reach of the grand jury that would qualify or explain away suspicious circumstances against him. But this does not mean—and this statement I am about to make is consistent with the one I have just made—it does not mean that you are to send out and search for testimony that would exculpate the persons who may be under charge. You are not a petit jury, and you have no right to supersede the trial jury by hearing both sides of a case. The evidence which you may send for to explain away or qualify the evidence for the state offered before you means simply that kind of testimony. It does not mean that you can send for evidence which would contradict the evidence offered for the state, and thus compel you to locate the preponderance of evidence, or to determine which of the witnesses whose testimony conflicts are telling the truth.

Sec. 1822. Scope of inquiry.

The oath which you took, gentlemen of the jury, makes it your duty to “diligently inquire and true presentment make of all such matters and things as shall be given you in charge, or may come to your knowledge touching the present service.” That language is a little bit obscure and it needs annotation.

Obviously it means any matter which may be given you in charge by the court, or which may be submitted to your consideration by the prosecuting attorney. It includes those cases in which persons have either been recognized or committed to jail to await an indictment, a list of which will be handed to your foreman.

This designation of the scope and subjects of your inquiry also means that it is your duty to inquire into crimes of which the knowledge may come to you from three other sources. While you are investigating the matters that may be submitted to your consideration by the court, or by the prosecuting attorney, or which may come before you on this list that I mention, a witness testifying may reveal facts showing that another crime has been committed; he may commit perjury in testifying. You may yourselves have witnessed the commission of some crime. From the disclosures made by your fellow jurors in the jury-room you may learn that other crimes have been committed. It is your duty to inquire into all these matters, for they come within the purview of that paragraph or portion of the oath which I have just quoted.²

¹ Code, sec. 13082.—This oath means that they are to inquire into the circumstances of the charge, the credibility of the witnesses; not to judge of the merits, but satisfy their minds that there is probable cause for the accusation. 1 Wharton's Cr. Law, 492.

² The grand jury shall proceed to inquire of and present all offenses whatever committed within the limits of the county. Code, sec. 13082. This seems to be the only statute in Ohio in any manner designating the scope of inquiry to be made. The extent of the powers of the grand jury is not well defined by statute or by the authority of precedent. Different courts have arrived at variant conclusions. Taking the oath administered and the provision of the statute referred to and it surely authorizes the jury to investigate for themselves. That grand juries may, on their own motion, institute any prosecution, see Opinion of Attorney General, 22; Wilson's Lectures, 361; U. S. v. Tompkins, 2 Cranch C. C. 46; Prof. Wharton's (5th Ed.) Crim. Law, p. 457, gives the opinion of Judge Catron, of the U. S. Circuit Court, in which he maintained that: "The grand jury have the undoubted right to send for witnesses and have them sworn to give evidence *generally*." In Ward v. State, 2 Mo. 120, the court held that the grand jury could call and request witnesses to testify *generally*. To same effect see

State v. Wallcott, 21 Conn. 272. Our statute makes it the duty of the clerk, "when required by the grand jury," to issue subpoenas, which further indicates that our state is not committed to the power of the grand jury themselves to institute matters.

In *Lewis v. Wake*, 74 N. C. 194, the inquisitorial power of the grand jury to invade the family privacy of the county was denied.

Sec. 1823. Secrecy must be observed—Another form.

Your oath makes it your imperative duty, gentlemen of the jury, to keep rigidly in confidence the counsel of the prosecuting attorney, his assistants, your fellow jurors, and yourselves, until compelled in a court of justice to reveal it. There is no obscurity in that language, and in that portion of your oath. It means that you are not at liberty to communicate to any person what has been done in the grand-jury room; it means that you are not at liberty to tell any person what has been done or said in the grand-jury room, either by the prosecuting attorney, or by his assistants, or by your fellow jurors, or by yourselves. It means that you must have courage enough to refuse to permit anyone to question you about the proceedings in the grand-jury room, or to suggest or ask you to vote for or against the indictment of anyone.

As a rule, legal proceedings do not avoid, but rather seek daylight. The proceedings of the grand jury are an exception. Accusing a person of a crime which may blast his reputation and cover him with ignominy is a grave matter, and should not be done except for sufficient reasons and for the most momentous cause. It has been the policy of the common law ever since the Great Charter to protect guiltless persons from accusation. One of the objects of the institution of the grand jury was to first have privately examined accusations of crime and ascertain whether there is a probability of their truth before giving them publicity in the form of an indictment.

Again, it is true that in every community there is a class of persons who are eager to start criminal prosecutions upon inadequate evidence. Sometimes this is done from honest motives; sometimes from base, malicious, and corrupt motives. If the grand jury were not required to keep secret their deliberations,

what occurs in the grand-jury room, you can readily see that, at every term of court, there might be a large crop of unjustly damaged reputations.

Again, when a criminal prosecution is started before the grand jury, this obligation of secrecy should be observed to prevent the accused from escaping justice, from escaping condign punishment. If they could learn, by the grand jury not keeping the secrets of the grand-jury room, that they are to be indicted, opportunities would be afforded for their escape. It is the usual mode of beginning prosecutions for an arrest to be made upon a warrant issued by a magistrate, and a preliminary examination to be had before the magistrate, where the accused can meet his accuser and have counsel to defend him and examine his witnesses; but the grand jury is not limited by law in its investigations to cases thus initiated. A criminal prosecution may have its genesis, its beginning, before the grand jury. I mention that because I want to further illustrate that statement I have made that it is necessary to observe this part of your oath in order to prevent that class of criminals from escaping punishment.

Again, if this obligation of secrecy was not enjoined by law, and grand jurors did not keep it, there would be another way in which justice might be defeated. It would enable the friends of those who were accused before the grand jury to bring to bear all possible influences to prevent the indictment.

It is therefore obvious, gentlemen of the jury, upon these considerations, that this duty of secrecy, although foreign to the law and its proceedings generally, is absolutely necessary in the investigations of the grand jury, for the protection of the innocent and the punishment of the guilty. It is not an idle obligation that you take to keep these matters secret. It is not a meaningless obligation; it is just as obligatory upon each grand juror as is the oath of a witness, to tell the truth, the whole truth, and nothing but the truth.¹

¹ Grand juror must not disclose that an indictment has been found against any person not in custody. R. S., secs. 13556, 13569. He can not state in court how he voted on any question. R. S., sec. 13570.

CHAPTER CVI.

HARBORING FEMALES.

SEC.

1824. House of ill-fame defined—
Harboring female of good
repute in—Harboring de-
fined.

SEC.

1825. Good repute for chastity de-
fined.

Sec. 1824. A house of ill fame defined—Harboring a female of good repute in—"Harboring" defined.

A house of ill fame is alleged to have been kept by this defendant, and that means she was the keeper of a house which persons of opposite sexes commonly used and resorted to for purposes of prostitution and lewdness. Whether or not it was such a house at the time named in the indictment you have a right to take into consideration the general reputation in the neighborhood where she lived as well as the testimony of any witnesses, including defendant herself, and determine from the whole proof whether or not at the time named in the indictment this defendant was in fact the keeper of a house of ill fame.

The indictment speaks of harboring a person, which means shelter afforded and a place of asylum furnished to such persons as came to her, and if you find from the proofs of the case at the time named in the indictment that this defendant furnished A. B. and C. D. a room to stay in for the purpose of lewdness you may find for the purposes of this case she was harbored.¹

¹ Collings, J., in *State v. McCandless*, Scioto Co. Com. Pleas. Approved by Circuit Court at March Term, 1897. The indictment was brought under Vol. 92, O. L. 207, and the defendant charged with harboring a female person of good repute for chastity under 18 years.

Sec. 1825. "Good repute for chastity" defined.

It is charged in the indictment and for certain purposes it must appear that the woman therein named, A. B., at the time

of the occurrence alleged in the indictment was a person of good repute for chastity, which is to say that among the people who knew her in the community where she lived and that persons with whom she associated knew her general reputation for chastity, morality and womanly behavior was not questioned or suspicioned. In order to determine whether or not, at the time of the occurrence alleged, she was a person of that repute, you have a right to take into consideration the testimony of the persons who were acquainted with her and with whom she associated, and what they say about her general standing and reputation in the community where she resided, as well as the conduct of the woman herself, and determine from the whole proof whether or not she, at the time of the occurrence, was a person whose standing and reputation for chastity where she lived was good. If you find that to be a fact, then you may say she was a person of good repute for chastity.¹

¹ Collings, J., in *State v. McCandless*, Scioto Co. Com. Pleas. Approved by the Circuit Court, March Term, 1897. The indictment was brought under Vol. 92, O. L. 207, amending Code, sec. 7023, and the defendant charged with harboring a female person of good repute for chastity under 18 years of age.

CHAPTER CVII.

HOMICIDE—MURDER IN THE FIRST AND SECOND DEGREE AND MANSLAUGHTER

SEC.

1826. Preliminary statement concerning duty and obligation of jurors.

1827. The indictment.

1828. Plea of defendant—Not guilty and of insanity.

1829. Burden of proof on plea of not guilty.

1830. Burden of proof of insanity.

1831. Degree of evidence required to prove insanity—Pre-

1831a. Insanity.
ponderance.

1832. Presumption of innocence.

1833. Reasonable doubt.

1834. Circumstantial evidence.

1835. Jurors must reason together.

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1837. Reputation of defendant for peace and quiet.

1838. Essential elements to be proven.

1839. Charge of first degree murder—Also includes lesser degrees.

1840. Law as to homicide—Murder in first and second degree, and manslaughter defined.

1841. Intent.

1842. Malice.

1843. Deliberation and premeditation.

1844. Murder in second degree—Distinguished from murder in first degree.

SEC.

1845. Manslaughter.

1846. Same—Provocation sufficient to reduce to manslaughter.

1847. Adequate or reasonable provocation—Another form.

1848. Provocation—Reasonable suspicion of infidelity not sufficient.

1849. Assault and battery and assault defined.

1850. What is essential to conviction in the first degree.

1851. An act feloniously done explained.

1852. Inflicting mortal wound with deadly weapon—Inference from.

1853. Person intends natural consequences of his act.

1854. If not found guilty of murder in the first degree, may be of second.

1855. May find guilty of manslaughter when.

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1857. Defendant as an aider and abettor.

1858. Defendant, though guilty of no overt act, entered into a conspiracy—Aider and abettor.

1859. Intent to kill in murder in second degree—Use of deadly weapon.

SEC.

1860. Malice—The character of weapon used to be considered.
1861. Manslaughter—No malice in—Provocation to reduce.
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1863. Malice in murder—Another form.
1864. Malice—Another form.
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1866. "Purposely," "unlawfully" and "feloniously."
1867. Proof of purpose to kill, malice, deliberation and premeditation.
1868. Person presumes reasonable consequences of his acts.
1869. Manslaughter—What is—Provocation.

SEC.

1870. Manslaughter—Person present doing no overt act not aider.
1871. Self-defense—Whether defendant believed he was about to be robbed—Burden of proof on defendant.
1872. Self-defense in self-protection against riotous strikers attempting to stop defendant from working.
1873. Self-protection in ejecting one from saloon.
1874. Self-defense—What constitutes—Another form.
1875. When a person may take the life of an assailant in self-defense—A different form—Giddings case.
1876. Right to repel assault.
1877. Son may defend parent.
1878. Justifiable homicide.
1879. Common defense from attack.
1880. Evidence of previous character and reputation.

Sec. 1826. Preliminary statement concerning duty and obligation of jurors.

You have heard the evidence offered on behalf of the state and the defendant, and it is now the duty of the court to instruct you concerning the law which shall govern you in your deliberations upon your verdict. It is your duty to act in accordance with these instructions, and to this end you will be studiously careful in the consideration of the evidence and the law.

You are the triers of the facts; in this respect the court has not supervision over you. You will ascertain and determine the facts from the evidence, to which you will apply the law as given you by the court, and render such verdict upon the facts in accordance with the law given you by the court, as your judgment dictates.

The law has made twelve men an essential part of the court, whose duty in determining the facts is as important as that of the court trying the case and determining the law applicable to it. This is the part which the people take in the administration of law and justice. You are just as much a part of the court as the judge who presides, and your offices for the time being are equally as important. The court thus constituted, is the supreme power that finally determines all questions between the state and the one charged with crime.

You are to exercise in all your deliberations the judgment of candid, intelligent men, who are anxious only to get at the truth. You should be especially careful that you shall be guided in the conclusion to which you come by the evidence submitted to you under the instructions of the court, and nothing else.

This is a case of first importance to the defendant and to the state, and the duty with which you are charged is one of the most solemn and sacred that can devolve upon a citizen in any relation of life. The citizenship of the state are satisfied with a fair, intelligent, impartial consideration and determination by a jury. It is essential to the peace and welfare of society and good government that every sane, guilty man be punished when his guilt is established by the measure of proof required to convict of crime in a court of justice. It is also essential to the welfare of society and of government that there shall be no conviction of a person irresponsible at the time of the commission of the act charged in the indictment. The great gravity of the charge and the caution with which you were selected as jurors, admonish you that your verdict should be reached with great care, uninfluenced by considerations of sympathy or prejudice, and that it should be the result of your soundest and best judgment upon the whole case.

If jurors discharge their duties well, if you challenge the respect of the community by the justice, intelligence and impartiality of your decision, you will command the respect and confidence of the people in our courts. It is of prime consequence that jurors respect and exalt the administration of jus-

tice, so that neither party shall have any cause to feel that the case has not been impartially considered and judged. Thus realizing the gravity of your duties, the court directs your attention to the charges made against the defendant by the indictment preferred against him by the grand jury.¹

¹ State v. Cly, Kinkead, J.

Sec. 1827. The indictment.

The indictment charges that the defendant on the —— day of —— did unlawfully, purposely and of deliberate and premeditated malice, kill and murder, etc. [The formal parts are omitted, because they are to be taken from each case.]

Sec. 1828. Plea of defendant—Not guilty and of insanity.

To this indictment the defendant has entered a plea of not guilty, which puts in issue and denies each and every averment therein.

In support of this plea of not guilty, defendant has interposed a plea of insanity. As a penalty of the law is assessed against persons only as are of sound mind and intellect, the court first instructs the jury concerning the plea of insanity.

Sec. 1829. Burden of proof on plea of not guilty.

The plea of not guilty places the burden of proving all the essentials of the crime on the state, which it must do beyond a reasonable doubt.

Sec. 1830. Burden of proof of insanity.

The law presumes every person to be sane until the contrary is shown. Therefore, the burden of proving the defense of insanity claimed is upon the defendant in this case. The presumption of law that the defendant was sane at the time in question is to be regarded by you as the full equivalent of express proof of his sanity until such time as it is made to appear to you by a preponderance of the evidence admitted in

this case that the defendant was insane at the time of the commission of the act of killing charged in the indictment.

The degree of evidence required for the proof of the defense of insanity claimed, is, that it shall be established by a preponderance of the evidence, the defendant being held to no higher degree of proof of this defense.

Sec. 1831. Degree of evidence required to prove insanity— Preponderance.

A preponderance of evidence in legal procedure means the greater weight thereof; that is, the jury is to be governed by what you consider to be the greater weight of the evidence, giving such credit to the testimony of witnesses as your judgment or opinion requires.

The greater weight of the evidence is to be determined by you not by the number of witnesses who have given their testimony, but by the character, quality, reason or logic and value of their testimony according to your best judgment; the greater weight means the greater probative value.

The law of this state does not require the defendant to prove his insanity at the time of the commission of the fact charged to a degree of certainty, but merely that he was probably insane. The evidence may be considered to preponderate in favor of the insanity of the defendant at the time, whenever its existence is by the greater weight of the evidence made probable in your opinion after having given a full and fair consideration of all the evidence adduced for and against it. If the evidence touching the defense of insanity in your opinion, upon full consideration thereof, is evenly balanced, it does not then preponderate and it will then be your duty to conclude by your verdict that defendant at the time of the act charged was sane.¹

¹ State v. Cly, Kinkead, J.

Sec. 1831a. Insanity.

The state has no interest in the conviction and punishment of an irresponsible person; it would afford no example to others, nor would it deter others from commission of crime. But the

state is zealous that justice shall be done. Every person is presumed to be sane, until proven insane.

A person who has normal intellect and reason, of course has the power and ability to control his act, and if he does not keep within the law, he must be held responsible.

If his mind is unbalanced, and is therefore unable to control his acts, he should not be held responsible.

The jury must move with caution, and carefully weigh every circumstance that may shed any light upon the question. You must decide whether the defendant probably had a diseased brain at the time, or whether he was actuated by excitement or highly nervous condition from worry, or by passions and angered feelings, or revenge, produced by motives of anger, hatred or revenge.

Many manifestations of insanity, as the term is used in law, are to be found in the law books. But I will not confuse the jury by stating them to you. I shall instead be content with merely stating what the real test of legal responsibility is, whether at the time of the homicide the brain of the defendant was partially deranged or diseased from some cause, to such an extent that his will power, his judgment, reflection and control of his mind was so impaired that the act of homicide was the result of diseased or deranged mind so that by reason thereof he was unable at the time to control his act, and that by reason of such condition of mind he was unable at the time to distinguish between right and wrong.

If the jury find from the evidence at the time defendant shot and killed his wife, there was some excitement of his mind which probably prompted an unpremeditated action of spontaneous inclination to kill his wife, which said excitement you find to probably have arisen from some mental derangement, instead of from feelings of passion, anger and revenge of a normal or sane mind, and that the defendant could not and did not at the time distinguish between the right and wrong of his act, then the jury may find the defendant not guilty.

If, on the other hand, you find from the evidence that the defendant was sane, that his mind at the time of the homicide

was not diseased, but that he was at the time responsible in law for the consequences of his acts, you will dismiss the question of insanity from further consideration, and then give attention to the facts and law touching the homicide.¹

¹ *State v. Kovacs*, Kinkead, J.

Sec. 1832. Presumption of innocence.

The indictment creates no presumption of guilt against the defendant. The law creates a presumption in favor of one charged with crime, that he is innocent until he is proven guilty according to law. This means that when the jury enters upon its deliberations in the consideration of the charges made by the indictment, it shall proceed upon the theory, as well as upon the fact, that defendant is presumed to be innocent. The defendant is entitled to the benefit of this presumption from the beginning of the trial, and until, after weighing the testimony carefully according to the tests prescribed by law, the jury reaches the conclusion that this presumption has been overcome.

It is the purpose of the law that jurors, in approaching the consideration of charges made by an indictment, shall have their minds free and open, and that they shall not be prejudiced or influenced by the fact that an indictment has been found against the defendant. The aim and purpose of the rule is that jurors are to consider, and be guided only by the evidence offered in the case. If the jury comes to the conclusion that the evidence has overcome the legal presumption of innocence, you are instructed then that in the further consideration of the testimony, touching the guilt or innocence of the defendant, you must be governed and guided by the rule of evidence applicable in criminal procedure that you shall be satisfied of the guilt of the accused beyond a reasonable doubt before you can find him guilty, and if not so satisfied you should acquit him.

Sec. 1833. Reasonable doubt defined and explained.

It is not incumbent upon one charged with a crime, in order to prove his innocence, that he shall satisfy the jury of the

existence of any material fact, which, if true, would constitute a complete defense. It is sufficient if the evidence merely creates in the minds of the jurors a reasonable doubt of the existence or truth of material facts, in which case the defendant is entitled to be acquitted. A reasonable doubt is an honest, reasonable uncertainty, such as may fairly and naturally arise in your minds, after having fairly and carefully considered all the evidence introduced upon the trial of this cause, when viewed in the light of all the facts and circumstances concerning the same. It is a doubt formed upon a real, tangible, substantial basis. It is such a doubt as would cause a reasonably prudent and considerate person to pause and hesitate to take action concerning matters affecting his own material interests, or in matters pertaining to the graver and more important affairs of life, or in transactions like the one involved in this case. A doubt is not reasonable if it rests upon or is founded upon a mere caprice, fancy or conjecture; it is unreasonable, also, if it arises in the mind of a juror by reason of his own personal feelings, passion or sentiment. A juror who acts upon such a doubt, or who creates a doubt in his own mind, to avoid a disagreeable duty, violates the oath which he takes. If, after a careful and impartial consideration of all of the evidence in this case, you can say and feel that you have an abiding conviction of the guilt of the defendant, and you are fully satisfied beyond a reasonable doubt of the truth of the charge, then you are satisfied beyond a reasonable doubt. If, from all the evidence in the case, the jury have a reasonable doubt, whether the defendant has been proven guilty, it is then your duty to find the defendant not guilty.

Sec. 1834. Circumstantial evidence.

The plea of not guilty entered by the defendant has the effect of a denial that he discharged the pistol which the indictment alleges defendant did discharge and shoot off to, against and upon the said A. C. with leaden bullets and shot her, the said A. C., then and there purposely and of deliberate and premeditated malice, and which did, as charged, cause her death.

No witness has been produced by the state who has testified that he saw the defendant do the shooting, as alleged. You will therefore look to and consider the surrounding facts and circumstances as developed from the testimony from which you will determine the truth or falsity of the allegations of the indictment according to the requisite degree of proof.

What is meant by circumstantial evidence in criminal cases, is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged, as tend to show the guilt or innocence of the party charged. If these facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant as charged, beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty of the crime or crimes charged, provided you find by the requisite degree of proof the existence of all the other facts essential to constitute the crime of which you find the defendant guilty by your verdict. Circumstantial evidence is legal and competent evidence in criminal cases, if of such character as to exclude every reasonable hypothesis other than that the defendant is guilty, and is entitled to the same weight as direct testimony.¹

¹ *State v. Cly*, Franklin Co. Com. Pleas. Kinkead, J.

Sec. 1835. Jurors must reason together.

The law, in constituting a jury of twelve men, thus contemplates that each and every one of you shall give your individual consideration of and judgment upon the evidence. The rules of law pertaining both to the essentials of the crime and the degree and rules of evidence, which are explained to you in these instructions, are necessarily binding upon the individual conscience and judgment of the members of the jury. It is the duty of each jurymen while deliberating upon his verdict, to confer with his fellows and give careful consideration to the views which his fellow juror may have to present upon the testimony in the case. A juror should not turn a deaf ear to the views of his fellows, and without listening to their

reasons and arguments, obstinately stand by his own opinion in the matter, regardless of what may be said by the other jurymen. It must be the object of all of you to arrive at a common conclusion, and to that end you should deliberate together with calmness and be considerate of each other's views.¹

¹ *State v. Cly, Kinkead, J.* This is supported by an opinion by Shauck, J.; *Davis v. State*, 63 O. S. 173, 174.

Sec. 1836. Credibility of witnesses.

The credibility of each of the witnesses is left entirely to the jury. The weight and credibility to be given the testimony is committed to your judgment. In determining this question, you may consider their intelligence, their manner and conduct on the witness stand, whether any witnesses showed zeal or feeling for or against either side; whether there was any reluctance on the part of any witness in testifying; whether a witness has an interest in the conviction of the accused, or an interest in his liberty, or in the liberty of any other person. You may consider the relation that each witness bears to the case; his means of information; the interest, if any, he may have in the result; the motives, if any, that might lead him to swear falsely, or otherwise; whether his motives for relating the facts testified to are wholly to bring a guilty person to justice, or to vent his wrath upon an innocent person; or whether his sole motive was to tell the truth without regard to consequences; whether or not any witness was in a situation that might tend to make him warp his evidence, or whether he was so situated that such witness or witnesses had no reason to testify falsely. You may consider the probability or the improbability of the truth of the statements made by any witness. You are not obliged to believe the statements of any witness merely because he made them; and you may, if your judgment dictates, believe part and disbelieve part of any witness' testimony. These and many other matters might be called to your attention whereby you are to test the evidence. Weighing the testimony by these and other tests you may have, you will determine the effect to be given it, and you will give the testimony

such credit as it is entitled to; and if you determine from all the evidence adduced at the trial, under the charge of the court, that the evidence has established beyond a reasonable doubt the guilt of the accused, it is your duty to say so in your verdict. But if the evidence has not so convinced you, your duty requires you to find the defendant not guilty.

Sec. 1837. Reputation of defendant for peace and quiet.

You are instructed that the defendant is entitled to have the evidence touching the question of his reputation for peace and quiet considered by the jury, together with all the other evidence. The weight to be attached to such evidence as bearing on the guilt or innocence of the defendant is for the jury alone to determine.

Sec. 1838. Essential elements to be proven.

Before a conviction can be had under this indictment there are certain essential elements of the crime which must be established by the state to your satisfaction, and satisfy you and each of you beyond the existence of a reasonable doubt, as already stated. These essential elements of fact are: The crime must have been committed by the defendant, in the County of ———, in State of ———, on or about ———, 19—; that W. H. H., named in the indictment, was at that time a living person in that county, that he is now dead, that he died in the County of ———, in the State of ———, on the ——— day of ———, 19—; that he came to his death by reason of a mortal wound inflicted upon him by the defendant in the manner and form, with the intent and purpose, and by the means mentioned and described in the indictment. These are questions of fact to be determined by you from the evidence in the case, and if the state has failed to establish each and all of them to the satisfaction of each and all of you, to the extent and in the manner already indicated, the defendant could not and should not be convicted.

Sec. 1839. Charge of first degree murder—Also includes lesser degrees.

This indictment by its terms charges the defendant, as already stated, with murder in the first degree; it also includes and embraces in its terms the crimes of murder in the second degree, manslaughter, assault and battery, and assault; and under it the defendant may be lawfully convicted of the crime of murder in the first degree, or any of the lesser crimes mentioned, if in your judgment the evidence before you, under the law here given, warrants such conviction, and upon the failure of the evidence under such rules as are here given you to establish his guilt as to any one of them, he must be acquitted. If the evidence so warrants it, you may find him guilty of murder in the first degree, or you may acquit him of murder in that degree and find him guilty of murder in the second degree, or you may acquit him entirely of murder and find him guilty of manslaughter, or you may acquit him of murder and manslaughter and find him guilty of assault and battery, or you may acquit him of all the foregoing and find him guilty of a simple assault, and should the evidence fail to satisfy your minds beyond a reasonable doubt and to the extent already stated of the guilt of the defendant of the crime of murder in either degree, or of manslaughter, or of assault and battery, or of assault only, you should acquit him and return a general verdict of not guilty.¹

¹ Code, sec. — (7316).

Refusal to instruct as to manslaughter when no evidence. *O'Brien v. Com.*, 89 Ky. 359. Not necessary to instruct as to lower degrees where no evidence warrants. *McClain Cr. L.*, § 391; 30 Cal. 206, 117 Mo. 389, 89 Ky. 354, 56 Minn. 78.

Sec. 1840. Law as to homicide—Murder in first and second degree, and manslaughter defined.

The court will now instruct the jury concerning the law of homicide, the different degrees and grades thereof.

Homicide, according to the statutes in Ohio, is divided into murder in the first degree, and murder in the second degree, and manslaughter.

One who purposely, and with deliberate and premeditated malice kills another, is guilty of murder in the first degree.

One who purposely, and maliciously, but without deliberation

and premeditation, kills another, is guilty of murder in the second degree.

Whoever unlawfully kills another, except as described in the two sections defining murder in the first and second degree, that is otherwise than purposely and with deliberate and premeditated malice, and otherwise than purposely and maliciously, but without deliberation and premeditation, is guilty of manslaughter. Putting it in another way, manslaughter is the unlawful killing by one person of another, either upon a sudden quarrel, and upon legal provocation, or unintentionally while the slayer is in the commission of some unlawful act. The essential facts, the existence of which the jury must find beyond a reasonable doubt, in order to find the defendant guilty of murder in the first degree as charged, are the following: 1. That M. K. is dead; 2. That her death occurred in Franklin county, Ohio; 3. That her death was caused by the act of the defendant by the means and in the manner as charged in the indictment; 4. That the wound was by him purposely inflicted with the intention of causing the death of the deceased; 5. That the wound was by him, the defendant, maliciously inflicted; 6. That the act of killing was so committed with deliberate and premeditated malice; 7. That the defendant was sane.

The court will now define and explain to the jury with some detail, the essential elements of murder in the first degree.¹

¹ State v. Kovacs, Kinkead, J.

Sec. 1841. Intent.

Purposely to kill, as used in the statute defining the crime, means that the jury must find beyond a reasonable doubt that the defendant intentionally took the life of the deceased. The law regards all persons who have arrived at years of discretion as rational beings, capable of reasoning from cause and effect upon matters within the ordinary experience and knowledge of men. It is, therefore, a rule of evidence which the jury must apply, that every person possessed of the faculty or reason, is presumed, as a matter of fact, to contemplate and intend the natural and probable consequences of what he does. Acting under this rule of law, and weighing and considering the evidence offered in support of the allegations in the indictment,

if the jury finds beyond a reasonable doubt that the defendant did, by the means and in the manner alleged in the indictment, take the life of M. K., then the jury may draw from such act or killing such inferences as in its judgment it believes the evidence to warrant, touching the intent of the defendant in taking the life of the deceased. In determining whether defendant intentionally took the life of his wife, the jury may, in addition to the consideration of the manner and means by which she came to her death, look to all the surrounding conditions and circumstances leading up to and at the time of the commission of the alleged act, and may draw therefrom such inferences as the judgment of the jury warrant, touching the intent of the defendant in the commission of the alleged act of homicide. If, therefore, you find that the defendant did take the life of the deceased intentionally, you will then proceed further to determine and find whether he did such act of killing with deliberate and premeditated malice, the essentials to constitute murder in the first degree. The jury will notice from the definitions of homicide in the three grades, that murder in the first degree differs from that in the second degree in that the intentional killing must have been done by defendant with deliberate and premeditated malice.¹

¹ State v. Cly, Franklin Co., Kinkead, J.

Sec. 1842. Malice.

Malice and intent or design to kill are essential ingredients of both murder in the first and second degree, but malice in the first degree differs from malice in murder in the second degree, in that malice in the first degree is termed in law "express malice," and which may be made to appear to the jury from evidence by conduct of the accused, previous to the act of crime alleged, by conditions and circumstances pertaining thereto, by conditions and circumstances under which the alleged crime may have been committed, by the manner and means in which the killing is alleged to have been done by the accused.

Such malice may appear and be found by the jury from the evidence, or, the jury may infer such malice from evidence of facts or conditions surrounding the alleged crime and leading up thereto, as before stated, in order and for the purpose of determining in the minds of the jury whether the act of killing should be raised to murder in the first degree. To warrant the jury in finding from the evidence that the defendant was actuated and controlled by deliberate and premeditated malice at the time of committing the alleged homicide, the jury must determine and find from the evidence that the defendant deliberated and premeditated upon a purpose to kill the deceased for such length of time that the jury may believe therefrom that the accused had prior to the act of alleged killing formed in his mind a settled purpose and intent to take the life of his wife.

Malice in murder in the first degree is an attribute of the mind, and must be found by the jury to be of such nature and character as to warrant it in believing and finding, beyond a reasonable doubt, that the mind of the defendant at the time of the alleged homicide was of a wicked, depraved and malignant nature and character; that he wholly failed to appreciate or regard his social duties to mankind and that he was fatally bent on mischief. This is the legal meaning of malice in the first degree. But it is not necessary that the jury should find that the malignity of the mind of the accused which resulted from the deliberate and premeditated malice, should have been confined to a particular ill will toward the deceased, his wife, although, the jury in determining upon the existence or non-existence of deliberate and premeditated malice, may look to all the circumstances, to all the conditions existing at the time of the alleged crime, and for some time prior thereto, respecting the relation existing between the defendant and his wife, as well as any statements made by defendant subsequent to the homicide, if any you find were made, and also the manner of the alleged killing.

While the jury in determining upon the existence or non-existence of deliberate and premeditated malice, may, as already

stated, consider with all the evidence the use of a deadly weapon in the alleged act of killing by the defendant and draw such inferences therefrom as in the judgment of the jury seems reasonable and proper touching the question of malice, still the court instructs you that any such inference as you may draw from that act, may not alone justify the jury in finding the existence of express malice which is essential in murder in the first degree.¹ In addition to such inference as to malice, before the jury may find the defendant to have been actuated by deliberate and premeditated malice, it must find from the surrounding circumstances and conditions, or from statements or declarations made by the accused, if any such were made, such facts as will warrant you in inferring therefrom that the act of alleged killing was done by the defendant with deliberate and premeditated malice.²

¹ *State v. Turner*, Wright, 20. See 102 Am. St. 1005. Actual intent, *Com. v. Drum*, 58 Pa. St. 9.

² *State v. Cly*, Franklin Co., Kinkead, J. Wharton Cr. L., §§ 147, 149, 150, 64 Mo. 319, 116 Ala. 454, 125 Ala. 636.

Sec. 1843. Deliberation and premeditation.

The law fixes no length of time within which, prior to the act of killing, the premeditated purpose to kill or the premeditated malice, shall be found by the jury to have existed in the mind of the defendant. It is an essential prerequisite of murder in the first degree that the accused shall have deliberated and premeditated upon the purpose to kill for some period of time prior to the act of killing as charged. Deliberation and premeditation as used in the statute are words of such familiar meaning as to need no explanation to a jury of intelligent men. Deliberation means that the defendant meditated and reflected upon the purpose to kill; premeditation means that the meditation incident to deliberation must have been before the act of killing as charged. The terms of the statute are such as to require that the defendant must have formed the purpose and intent to kill, and that the same must have existed in the mind for such a period of time prior to the killing as precludes the idea that the purpose and intent to kill was formed for the first time at the very time of the act of killing. If you find that

the defendant had no such intent and purpose to kill in his mind prior to the act of killing, you would not be justified in finding the defendant guilty of murder in the first degree. It is only essential that the jury should find from the facts and circumstances that the design and intent to take the life of the deceased existed for some period of time prior to the act of taking the life of the deceased; and it is sufficient although but a short time elapsed after such purpose was formed and the act of killing was done, if there was deliberate and premeditated malice upon the part of the defendant.¹

¹ State v. Cly, Kinkead, J.

Sec. 1844. Murder in second degree—Distinguished from murder in first degree.

The court now instructs you as to murder in the second degree. It is defined by statute as follows: Whoever, purposely and maliciously kills another, but without deliberate and premeditated malice, is guilty of murder in the second degree.

Murder in the second degree is distinguished from murder in the first degree, in that it lacks the element of deliberate and premeditated malice.¹ It has the common essential of intent to kill; and malice is also an essential. But in this degree malice is what is termed in law to be implied malice. Its meaning is the same in the second as it is in the first degree of murder; that is, it is the dictate of a wicked, depraved and malignant mind, indicative of a mind devoid of all social duties in his relations to society and to those about him. The distinguishing characteristic of malice in second degree murder from malice in the first degree is in the manner and mode of proof thereof.² Keeping in mind the meaning of malice, it need only be here stated that if the jury find from the evidence that the deceased came to her death by means of a pistol shot fired into her body at the hands of the defendant, as charged in the indictment, and the jury believes that such act was naturally calculated to cause her death, it may infer malice therefrom.³

¹ 68 Cal. 101, 8 Colo. 563, 19 Iowa, 447, 71 N. H. 606, 148 Pa. St. 26.

² 116 Ala. 454, 125 N. C. 636.

³ State v. Cly, Franklin Co., Kinkead, J.

Sec. 1845. Manslaughter.

Manslaughter is distinguished from murder in the first and second degree by the fact that the killing is done unlawfully, either upon a sudden quarrel upon legal provocation, or unintentionally while the slayer is in the commission of some unlawful act. Intentional manslaughter may by the verdict of the jury be found from the evidence only when it finds that the act of killing—not being murder in the first degree—is the result of a sufficient provocation, that is, such provocation as under the law the jury may find to be adequate to reduce the act of killing from murder in the second degree.

It is the province of the court to instruct the jury as to what may warrant it in reducing, by its verdict, the crime from murder in the second degree to that of manslaughter, it being a legal question, while it is the function of the jury to determine the existence or non-existence of such facts as may or may not warrant you in rendering, upon the evidence, a verdict of manslaughter. The jury will be called upon to consider this question only if you should be of the opinion from all the evidence that the defendant was not guilty of murder in the first degree.

It is a rule of law that an indictment for murder in the first degree necessarily embraces the lower grades of homicide, upon the principle that the whole necessarily comprehends its various parts, and if the evidence presented warrants it, the jury may acquit the accused of the higher degree, or degrees, and convict of the lower.

Manslaughter is the unlawful killing of another.

The absence of malice is the element of the case in homicide which makes it manslaughter.¹

¹ *State v. Cly, supra*, Kinkead, J. No malice in manslaughter. Knapp case, 4 C. C. (N.S.) 184; *affd.*, 70 O. S. 380.

Sec. 1846. Same—Provocation sufficient to reduce to manslaughter.

The homicide can be reduced from murder in the second degree if the act is committed by the use of an instrument calculated to

cause death, only when it appears from the evidence that the act of killing was done in the sudden heat of passion and upon sufficient provocation. When a person is killed under the influence of passion, or in the heat of blood, produced by an adequate provocation and before a reasonable time has lapsed for the passion to cool, the act of homicide will in such case be reduced to manslaughter. The provocation must be so near to the act of killing as that there is not time for the blood or passion to cool and the act of killing, to be manslaughter, must be directly caused by the passion arising out of the provocation.

It is the province of the court to state what in law constitutes adequate provocation to reduce the crime of homicide, and the province of the jury to determine and find the fact of the existence of sufficient provocation from the evidence.

Suspected infidelity of a wife, or known past infidelity of the wife, are not deemed in law to be adequate provocation to justify a husband in taking the life of his wife, nor is an unwillingness on the part of the wife to live with her husband adequate provocation in law to reduce a homicide from murder to manslaughter.

Nor are threats or harsh words sufficient provocation.

With these instructions, gentlemen, the question is submitted to you for your determination of the facts.

The court has now stated the law to you touching the three degrees of homicide, pointing out the elements of each. You will carefully weigh the evidence and apply the law, and decide the facts in accordance therewith.¹

¹ State v. Kovacs, Kinkad, J.

Instruction concerning form of verdict. If you find that defendant was insane, acquit him.

If you find that he was sane, and that he purposely and with deliberate malice, killed his wife, then your verdict should be one of guilty of murder in the first degree.

If you find that he purposely and maliciously killed her, but without deliberate and premeditated malice, then your verdict should be guilty of murder in the second degree.

If you find him not guilty of murder in the first or second degree but that instead he killed her intentionally and unlawfully, in a sudden heat of passion, and upon sufficient provocation within the law given you by the court, your verdict may be manslaughter.

The jury should come at its verdict without regard to the penalty imposed by law. You may, however, in the event that your verdict should be one of guilty of murder in the first degree, if you deem proper, recommend mercy, in which case it will be the duty of the court to sentence the defendant to imprisonment in the penitentiary for life.

Sec. 1847. Adequate or reasonable provocation—Another form.

While the definition of an adequate or reasonable provocation is so general, and perhaps somewhat indefinite, the law is explicit in its enumeration of some of the facts that do not constitute a legal provocation at all. Thus words of reproach, no matter how grievous they may be, and contemptuous and insulting actions or gestures, no matter how much calculated to excite indignation, or to arouse the passions, are insufficient to free the prisoner from the guilt of murder if all the material facts necessary to constitute that offense have been proved. The provocation to have the effect of alleviating the killing into manslaughter must have consisted of personal violence done by the deceased to the prisoner. Nor can the threats which were said to have been made by O. against the life of the prisoner be considered as a reasonable provocation to negative the inference of malice and reduce the killing to manslaughter.¹

¹ Pugh, J., in the Elliott case, Franklin Co. Approved by Sup. Ct. That legal provocation means personal violence, see 26 W. L. B. 117, and cases cited there. Although provocation will not excuse, it will sometimes furnish ground for inflicting less severe punishment in homicide. Clark's Cr. L. 72. Where there is adequate provocation the offense may be manslaughter. *Maher v. People*, 10 Mich. 212. By adequate or reasonable provocation is meant a provocation, under the influence of which an ordinary man of fair disposi-

tion is likely to act rashly, without due deliberation or reflection. *Maier v. People*, 10 Mich. 212. What is a reasonable or adequate provocation is a question of fact for the jury. Provocation need not be at the time of the affray, but merely so recent as to show no time for the blood to cool, 4 O. C. C. 141. One day is sufficient for cooling time, 26 W. L. B. 116.

Sec. 1848 Provocation—Reasonable suspicion of infidelity of wife not sufficient.

Causes arising from infidelity of a wife, as where the accused, the defendant, discovers another person with his wife in the act of committing adultery, the killing of the wife at the time of such discovery by the husband would be such legal provocation as would warrant the jury in rendering a verdict of guilty of manslaughter.

But it is only when the husband has detected his wife in the act of adultery that the provocation will be deemed in law sufficient. If the jury should find from the evidence offered in this case that the defendant did not discover his wife in the act of committing adultery, but should find, on the contrary, that the defendant had reasonable suspicion and cause to believe that his wife had at some time previous to the act of alleged killing committed acts of adultery, you are instructed that if you should find the act of killing to have been done by the defendant under such circumstances, and as alleged in the indictment, and for such a cause, in the heat of passion resulting therefrom, you would not be justified in rendering a verdict in such case for manslaughter.¹

¹ *State v. Cly*, Franklin Co. Com. Pleas, Kinkead, J. Information of wife's infidelity. *Sawyer v. State*, 35 Ind. 80, 84; *Laros v. C.*, 84 Pa. 200, 2 Bish. Cr. Pr., sec. 675

Sec. 1849. Assault and battery and assault defined.

Assault and battery consists of any intentional violence by one upon the person of another; as the bare touching of the person of another in an angry, revengful, rude, or insolent manner, and even greater violence might amount to no greater crime. An *assault* is defined to be any attempt by violence to do a personal injury to another, and this may be either with the

hand or with a weapon, but it must not be more than an attempt, it must fall short of inflicting the intended injury or it would amount to something more than an assault.

Sec. 1850. What is essential to conviction in the first degree.

Under this indictment it is essential to a conviction of murder in the first degree, and you and each of you should be satisfied beyond the existence of a reasonable doubt, and to the extent already stated, that the defendant, in the manner and in the form charged, and at the time and the place charged, did kill said W. H. unlawfully, feloniously, and purposely, and of deliberate and of premeditated malice. An act is done unlawfully when done in violation of law.

Sec. 1851. An act feloniously done explained.

To do an act feloniously is to do it criminally. To do an act purposely means to do it intentionally, not accidentally or by mischance, and this is the sense in which this term is used in our statutes and in this indictment. It imports an act of the will, intention—a design to do an act. Ordinarily the purpose to kill is to be gathered or deduced from the circumstances under which the killing is done. The presence of intent or purpose is a question of fact to be determined by you from all the circumstances and facts proven in the case.¹

¹ An intention must be present, 25 O. S. 464.

**Sec. 1852. Inflicting mortal wound with deadly weapon—
Inference from.**

If you find under the instructions here given, that the defendant inflicted a mortal wound upon W. H. with a deadly weapon, that the same was used in a manner purposely calculated to destroy life, you may infer the intent or purpose to kill from the use of such weapon.¹

¹ *Gardner v. State*, W. 392; *Erwin v. State*, 29 O. S. 186. A deadly weapon is one which is dangerous to life when used in the manner in which it is capable of the most injurious results, *United States v. Small*, 2 *Curtis*, 241.

Sec. 1853. Person intends natural consequences of his act.

It is a general principle and you may apply it to this case, that what a man does willfully he intended to do, and intended the natural and reasonable consequences of his voluntary and deliberate acts, unless the circumstances are such as to indicate the absence of such intent.¹

¹ Robbins v. State, 8 O. S. 131.

Sec. 1854. If not found guilty of murder in the first degree, may be of second.

If you find the defendant is not guilty of murder in the first degree, you may then inquire further and ascertain and determine whether under this indictment he is guilty of murder in the second degree. As already stated, the essential elements of this crime are the same as those of murder in the first degree, except it is not necessary that the killing be done of deliberate and premeditated malice. Therefore, if you are satisfied beyond the existence of a reasonable doubt that the defendant, on the — day of —, 19—, in the County of —, and State aforesaid, in the manner and by the means mentioned and described in the indictment, did unlawfully, feloniously, and purposely kill W. H., but without deliberation or premeditation, or either of them, then he is guilty of murder in the second degree, and you should so report by your verdict. If, however, you have any reasonable doubt as to the essentials of any one or all of these elements of murder in the second degree having been established by the evidence in this case, it will be your duty to acquit the defendant of the crime of murder in the second degree under this indictment. In considering the evidence and determining whether or not the defendant is guilty of murder in the second degree, you should apply the same definition to the words “purposely” and “maliciously,” and the terms “malice” and “purpose,” or any other terms therein used, as have already been given to you in connection with the instructions as to murder in the first degree.

The law presumes any felonious killing to be murder of some degree, but that presumption rises no higher than second degree, unless the state, by clear and satisfactory evidence, establishes the guilt of the defendant of the higher crime to the extent and in the manner already stated.¹

¹ The jury may determine the grade of crime. *Adams v. State*, 29 O. S. 412; *Dresback v. State*, 38 O. S. 365.

Sec. 1855. May find guilty of manslaughter, when.

If you in your investigation of this case should find the defendant not guilty of murder in the first or second degree, you may inquire further and ascertain whether the defendant is guilty of unlawfully killing W. H., in the manner and by the means and at the time and place charged in the indictment, and if you should be satisfied to the extent and in the manner already stated that W. H. was killed by the defendant, then you should find the defendant guilty of manslaughter, and should return a verdict accordingly; but if you and each of you should not be so satisfied, then you should render a verdict of acquittal as to this offense. In manslaughter, as already stated, the unlawful killing may be without malice, either upon sudden quarrel or unintentionally whilst the slayer is in the commission of some unlawful act, and the same certainty of proof is required and the same degree of proof as indicated as being necessary in murder in the first and in the second degree before a verdict of guilty could be rendered against this defendant for manslaughter.¹

¹ See *Adams v. State*, 29 O. S. 412. Under indictment for second degree may be convicted of manslaughter. *Wroe v. State*, 20 O. S. 460.

Sec. 1856. May find guilty of assault and battery.

If you should find the defendant not guilty of any of these crimes already mentioned, you may under this indictment, if the evidence in the case warrants it, find the defendant guilty of an assault and battery, or of an assault only.¹ The essential elements of these offenses have already been given in the definitions of the same, and need not now be repeated. These offenses should be established by the same certainty of proof as already

indicated as being necessary in each of the other crimes named, and, unless you are satisfied in the manner and to the extent already stated that the defendant is guilty of any one of the crimes or offenses named, it is your duty to acquit him, and the presumption of innocence already spoken of follows the prisoner and inures it to his benefit to the extent already stated as to all the crimes and offenses here named, and to each essential element necessary to constitute such crimes or offenses.

¹ *Marts v. Stump*, 26 O. S. 162; *Lindsey v. State*, 69 O. S. 215; *Dresback v. State*, 38 O. S. 367, 5 O. 241, 13 O. S. 569, 23 O. S. 582, 25 O. S. 399.

Sec. 1857. Defendant as an aider and abettor.

If you find, under the directions and instructions here given you, that W. H. was killed at the time and place, and in the manner and by the means mentioned in the indictment, it is not necessary for you to find that the blow that killed H. was struck by this defendant himself, if you find that the defendant was present, aiding and abetting the person who struck the blow, and was there acting in concert with such person with the intent and purpose of aiding him in the commission of the offense, and in pursuance of a common design and purpose previously formed. Ordinarily that person is regarded as the principal who performs the act complained of, and one who acts in concert with him with the intent and purpose to aid in the performance of the act and commission of the offense is an aider and abettor. The law, however, provides that: whoever aids or abets, or procures another to commit an offense may be prosecuted and punished as if he were the principal offender. And, in this case, I say to you as a matter of law that, if you find that a crime was committed as charged in this indictment, under the directions and instructions here given you, and you should find that this defendant with others had formed a joint design and purpose to commit the same, and at the time the same was committed this defendant was acting in concert with others in the commission thereof, and with the joint intent and purpose to commit the same, and that while one or the other of those thus acting in concert with the

defendant did the manual act of committing the crime or offense of striking the blow upon the forehead of W. H., in pursuance of such common design and purpose, this defendant was present, aiding and abetting in the accomplishment of the common design and purpose, then he would be guilty of the crime or offense so committed, and may be convicted as principal, under this indictment, of any of the crimes and offenses therein charged. But you can not under this indictment find the defendant guilty by reason of any offense committed or any act done against H. H., and before you can find this defendant guilty, you must find that there was a common design and purpose between him and the others engaged in the commission of the crime, to do the act complained of, and use the weapon, if you find a weapon to have been used, in the manner and for the purpose intended by its use, and all these matters must be proven in the manner and to the extent indicated as being necessary in order to establish the crime itself or the essential elements thereof.¹

¹ J. R. Johnston, J., in *The State v. Charles Morgan*, the famous "Blinky Morgan" case. Court of Common Pleas, Portage County, Sept. 7, 1887.

Sec. 1858. Defendant, though guilty of no overt act, entered into conspiracy—Aider and abettor.

In determining the question of the defendant's guilt or innocence of the alleged crime of murder in the second degree, as well as of the other grades of crime included in the indictment, as heretofore explained, the circumstances may be such that the defendant is responsible for the criminal act although he may not have personally struck the fatal blow or blows resulting in W.'s death. If you find that O. and one or more of his associates who were with him on that occasion had, before this alleged affray, planned to make an unlawful assault upon W., or one or more of O.'s said associates, in furtherance of their common plan, or design, struck the fatal blow or blows resulting in W.'s death, or, if at the time of the alleged homicide O. was present and assisted, aided or abetted, or purposely incited or encouraged one

or more of his said associates to strike the blow or blows resulting in W.'s death, the defendant is equally as guilty as if he had struck the fatal blow himself.

On the other hand, the circumstances may be such that, although O. was involved in the affray that resulted in the death of W., O. would not be guilty of any offense, or may be guilty merely of the offense of assault and battery. If you find that there was no plan, before the affray, between O. and one or more of his associates then with him, to commit the unlawful assault upon W., and that the fatal blow or blows, if struck, were struck by one or more of O.'s associates, and that O. did no overt act with a view to produce the killing of W., nor in any wise aided, or abetted, or incited, or encouraged the others to assault W., or to do the killing, although the defendant and W. were involved in an independent affray, wherein W. was the aggressor, or assailant, and the defendant was within his own rights in carrying on the affray, the defendant is not guilty of any crime. Furthermore, if you find from the evidence that there was no previous plan between O. and one or more of his associates to commit an unlawful assault upon W., or to kill him, and that the fatal blow or blows were struck by one or more of O.'s associates and that O. did no overt act to produce the killing of W., or in any wise aided, abetted, or incited, or encouraged any of the others to make the unlawful assault, or to do the killing, but became involved and was the aggressor in an independent fight with decedent, in no wise connected with the others, and not calculated to produce death, or, after the fatal blow was struck by another, he himself struck the decedent a blow or blows which were not calculated to produce, and did not produce nor to contribute to the death of W., the defendant would not be guilty of murder in the second degree, or manslaughter, but would be guilty of assault and battery.

Keeping in view the instructions which I have just given you with regard to the circumstances under which the defendant is responsible for the criminal acts of one or more of his associates, and those circumstances wherein he is not responsible for such

acts but is only responsible for his own criminal act or acts, if any, the court will now proceed to charge you with regard to murder in the second degree as alleged in the indictment. The offense charged is that the defendant purposely and maliciously killed one J. W. on or about the —— day of ——, 19——, in this county and state.¹

¹ State v. Orris, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1859. Intent to kill in murder in second degree—Use of deadly weapon.

To authorize a verdict of guilty of murder in the second degree it must be affirmatively shown by the state that there was at the time the blow was given an intent existing in the mind of the defendant to kill the deceased, and that he delivered the blow or blows with the intent to kill.

To do an act purposely means to do it intentionally, not accidentally or by chance, and this is the sense in which this term is used in our statutes and in this indictment. It imports an act of the will, intention, a design to do an act. Ordinarily, the purpose to kill is to be gathered or deduced from the circumstances under which the killing is done. The presence of intent or purpose is a question of fact to be determined by you from all the circumstances and facts in the case. If you find under the instructions here given that the defendant, or one or more of his said associates, under circumstances as herebefore related, making O. responsible for their acts, inflicted a mortal blow or blows on J. W. with a deadly weapon, and that the blow or blows were applied in a manner purposely calculated to destroy life, you may infer the intent or purpose to kill from the use of such weapon, and from all other facts and circumstances in the case. It is a general principle, and you may apply it to this case, that what a man does willfully, he intended to do, and intended the natural and reasonable consequences of his voluntary and deliberate acts, unless the circumstances are such to indicate the absence of such intent.¹

¹ State v. Orris, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1860. Malice—The character of weapon used to be considered.

Malice, as already stated, is an essential element of murder in the second degree. In law, malice signifies a willful design to do another an unlawful injury, whether such design be prompted by hatred or revenge or springs from the wantonness or depravity of the heart, disregarding all social and moral duties and fatally bent on mischief.

Applying the law just stated with regard to the elements of purpose and malicious intent to kill, you will consider all the facts and circumstances adduced on the part of the state, to determine, if you conclude that the defendant killed J. W., as charged, whether or not he killed him purposely and intentionally, and further, whether or not he killed him maliciously. In considering these matters, you will take into consideration the character of the weapon, if any, the manner of its use, if any, the acts and conduct of the defendant at the time of the alleged killing, the probable consequences by the use of such weapon, if any, or producing death, or otherwise, applying these and all the other facts and circumstances adduced you will determine whether the purpose to kill and the malicious killing, as charged in the indictment, have been proved. If you determine that it is not proved, either that the alleged killing was done purposely or maliciously, or was done in this county and state, or was done by the defendant, it will be your duty to find the defendant not guilty of murder in the second degree.

Sec. 1861. Manslaughter—No malice in—Provocation to reduce.

In manslaughter the element of malice, which is an essential element of murder in the second degree, is wanting. When a person is killed under the influence of passion, or in that heat of blood produced by an adequate or reasonable provocation and before reasonable time for the blood to cool and reason to resume its habitual control, and is the result of temporary excitement by which the control of reason was disturbed, rather than by

wickedness of heart or cruelty or recklessness of disposition, the crime is only manslaughter. But the provocation must have been given at the time of the commission of the offense or so short a time before, that there was no time for the blood to cool and reason to resume its control over the mind. This adequate or reasonable provocation has been said to be of a character which will commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper sufficient to render the mind incapable of reflection. The provocation must be of that kind and character which ordinarily provokes and leads to or causes a great degree of violence. If it is of that character from which a great degree of violence does not ordinarily follow, then it is not a reasonable provocation.

Sec. 1862. Provocation—All surrounding circumstances to be considered—Cooling time.

The jury should take into consideration all of the circumstances preceding, as well as attending the commission of the alleged homicide, and inquire what would ordinarily have been the conduct of men in general under like circumstances, and if the jury should find that the defendant did no more than might be expected of men in general under like provocation, the law, in its tenderness to human frailty, would require the jury to say that the killing was only manslaughter, but if you find that at the time of the killing there was no sufficient provocation, or if you find there was sufficient provocation prior to the killing, had the killing taken place at that time, which would have reduced the grade of the crime to manslaughter, that a sufficient time had elapsed between the time of the giving of the provocation and the time of the killing for the blood to cool and reason to resume its control over the mind, if all the other elements are proven, as I have defined them, then the provocation would not be sufficient to reduce the crime to manslaughter.

Sec. 1863. Malice in murder—Another form.

Malice is a distinctive feature in the charge of murder, for without it there can be no such thing as murder. It relates to

the moral qualities of a man's acts. Its general use in law is to express an act done without any sufficient reason where the act is wrong in itself. As applied to a case of homicide it expresses that it was committed by the accused without any adequate reason therefor and under such circumstances of cruelty as to evidence a mind devoid of social duty and fatally bent on mischief. And because ordinarily no man may lawfully kill another, and intentional homicides are in general the result of malice and evil passions, or proceed from a heart devoid of social duty, in every case of intentional homicide not otherwise explained by the circumstances it is presumed in the first instance that the slayer was actuated by malice, and the burden is placed upon him of showing the contrary, unless it appears from the circumstances adduced against him by the state. It is not necessary, however, that he should do this by evidence establishing the facts on which he relies to remove the inference of malice beyond a reasonable doubt. It is sufficient if the circumstances on which he relies for this purpose are established by a preponderance of evidence. If, after weighing and considering the evidence offered by the state, in connection with that offered by the defendant, the jury entertain a reasonable doubt as to the existence of malice, they should resolve that doubt in his favor; for when such a doubt exists after hearing and weighing all the evidence *pro* and *con*, the preponderance must certainly be with the defendant.

The absence or existence of malice in the act of killing marks the distinction between murder and manslaughter. For though, under our statute, there may be malice in an unintentional killing amounting to manslaughter, still malice in such case is a very different thing from malice in an intentional killing. For the term malice is always referable to the nature of the act it is intended to characterize; a malicious beating is one thing and a malicious killing is another and different thing.¹

¹ Thad. A. Minshall, J., in the Giddings case. Malice defined. *State v. Turner*, W. 20; *State v. Gardner*, 9 W. L. J. 411.

Malice presumed from killing. *Davis v. State*, 25 O. S. 369; *State v. Turner*, W. 20; *State v. Town*, W. 75. Or by use of deadly weapon the jury may infer it. *Erwin v. State*, 29 O. S. 186; *Clark's Crim. Law*, p. 160, note 126 and cases.

"The idea is not spite or malevolence to the deceased in particular, but evil design in general, the dictate of a wicked, depraved, and malignant heart; not premeditated hatred or revenge towards the person killed, but that kind of unlawful purpose which if persevered in must produce mischief." *State v. Pike*, 49 N. H. 399; *Com. v. Webster*, 5 Cush. 295. It has a broader meaning in this connection than in ordinary language. Commonly it signifies hatred to an individual. Malice is express or implied. Express when it is personal malice against an individual, which intends to take life. Implied is an evil and malignant purpose prompting the act resulting in death.

Sec. 1864. Malice—Another form.

"Malice is a necessary ingredient in both murder in the first and murder in the second degree. Unless the prisoner was actuated by malice, he can not be said to have been guilty of murder in either degree. 'It is not easy to give it (malice) any exact definition. It relates to the moral qualities of a man's acts. Its general use in law is to express an act done without any sufficient reason, when the act is wrong in itself. As applied to a case of homicide it expresses that it was committed without any adequate reason therefor and under circumstances of cruelty, as to evidence a mind devoid of social duty and fatally bent on mischief.'"¹

"Malice in a legal sense does not necessarily mean spite, hatred, ill will, revenge, or jealousy. It may, however, include all or any of these qualities. Whenever a wrongful act which produces death is intentionally done, without just cause or excuse, and the purpose to kill is deliberated upon and premeditated, it is, in the absence of mitigating circumstances, murder in the first degree."²

¹ Giddings case, Judge Minshall's charge, page 422.

² D. F. Pugh, J., in the Elliott case, Franklin Co. Approved by Sup. Ct.

1 Bishop's Cr. Law, sec. 429, 3.

**Sec. 1865. “Deliberation” and “premeditation” in murder
—Another form.**

“The statute defining the crime is in these words: ‘If any person shall purposely, and of deliberate and premeditated malice, kill another, every such person shall be guilty of murder in the first degree.’ The words *purposely, of deliberate and premeditated malice*, as applied to the act of killing, have much meaning. Purposely implies an act of the will; an intention; a design to do the act. It presupposes the free agency of the actor. *Deliberation* and *premeditation* require action of the mind. They are operations of the intellectual faculties, and require an exercise of reason, reflection, and decision.”¹

“By the term ‘deliberate,’ it is meant that the purpose to kill was considered. It means that the purpose to kill was not the sudden, rash conception of an enraged mind, but that the mind of the prisoner was sufficiently cool and self-possessed to consider and contemplate the nature of the act to be done. The term ‘premeditated,’ signifies that the purpose to kill was thought about and considered before it was put into execution. The term ‘deliberation,’ does not mean that the purpose was brooded over, or that the prisoner’s mind was absolutely calm and unruffled at the time he deliberated. It is only necessary that it should be sufficiently composed, calm and undisturbed to admit of reflection and consideration of the design. Nor do the terms ‘deliberate’ and ‘premeditate’ import that the purpose to kill had to be conceived, deliberated upon and premeditated any specific period of time before the killing was done. The question is not how long did the prisoner deliberate and premeditate, but did he deliberate and premeditate at all?

“Logically and legally some time must have intervened between the conception and execution of the purpose to kill, but it matters not how short the time was. The operations of the mind are so swift and deed follows thought so quickly that the deliberation and premeditation, and decision and act may all occur in a very brief space of time. The time will vary as the minds and temperaments of men and circumstances under

which they are placed will vary. 'Deliberation and premeditation for a moment, as well as for a week, will render an intentional killing murder in the first degree.' It is immaterial whether the deliberation was in forming the purpose to kill, or in the continuance of the design after it was formed until it was executed. The distinctive difference between murder in the first and murder in the second degree is that there is no deliberation and premeditation in murder in the second degree. There must be purpose and malice as in murder in the first degree, but the malice need not be of the deliberate and premeditated character. If the purpose to kill appeared and existed for the first time in the prisoner's mind in the act of killing, the killing was only murder in the second degree. So, also, if the intention to kill was formed and executed in and from a sudden transport of passion, aroused by provocation, but the provocation was not sufficient, in law, to reduce the killing from murder to manslaughter, it would only be murder in the second degree."²

¹ Judge Birchard in *Clark v. State*, 12 O. 495.

² D. F. Pugh, J., in the Elliott case. Approved by Supreme Court. Deliberation and premeditation defined. *Turner v. State*, W. 20; *Shoemaker v. State*, 12 O. 43; *Burns v. State*, 3 W. L. G. 323. See Bishop's Cr. Law, sec. 728.

Sec. 1866. "Purposely," "unlawful" and "feloniously."

Under the first count it is essential to the conviction of murder in the first degree, that it appear that the defendant, in the manner and form charged, at the time and place charged, killed the said H. unlawfully, feloniously, purposely, and of deliberate and premeditated malice. An act is done unlawfully when done in violation of the law; to do an act feloniously is to do it criminally. The word "purpose" is used in the statute in its plain and ordinary signification. It means an act done intentionally, not accidentally or by mischance. It imports an act of the will, intention, a design to do an act. Ordinarily the purpose to kill is to be gathered or deduced from the circumstances under which the killing is done. If the instrument used in inflicting the mortal wound was a deadly weapon, and it is willfully and

in a manner purposely calculated to destroy life, the jury may infer the intent or purpose to kill by such use of the weapon.¹ It is a general principle that what a man does willfully he intended to do, and intends the natural consequences of his voluntary act, unless the circumstances in this particular case show the absence of such intent.²

¹ Bishop's Cr. Law, sec. 680 and cases. An instruction that if the jury "find from the evidence that the defendant used a deadly weapon *in this case*, and that death ensued from the use of such deadly weapon, then the law raises the presumption of malice in the defendant, and also an intent *on his part* to kill the decedent," was held erroneous, 29 O. S. 192.

² Wm. R. Day, J., *State v. Webster*, Trumbull Co. Com. Pleas.

The "purpose" in general is proved from circumstances. *Gardner v. State*, W. 392. See 8 O. S. 98, 8 O. S. 306, 10 O. S. 459.

Sec. 1867. Proof of purpose to kill, malice, deliberation and premeditation.

Now as to the proof of the purpose to kill, of malice, deliberation, and of premeditation. Intention and malice are of the heart and mind. Neither was probably ever proved to a jury by direct, positive evidence. The only possible direct witness to prove that the prisoner's purpose was to kill O. and that he was actuated by malice was the prisoner himself, and if he had meant to testify that his mind and heart were in that condition before and at the time O. was killed, he would have plead guilty, which he did not do, but denied all of the incriminating circumstances which the state's evidence tended to prove. The existence or absence of malice and of purpose to kill is an inference which must be drawn by you from all the facts in the case. The emotions of the prisoner's heart and the operations of his mind at the times mentioned can only be revealed to you by his acts and his declarations. You have no power to ascertain the exact condition of his mind and heart at the times in question; the best you can do is to infer what it was from his acts and declarations. In determining this you should also consider what he has said here on that question in his testimony, if you believe him, and also all the other evidence bearing on this question. I

have already said to you that a person is presumed to intend what he does. When a man performs an act which he knows will produce a particular result, from our common experience he is presumed to have anticipated and intended that particular result. The intention to kill, malice, deliberation, and premeditation may be proved by circumstantial evidence. The circumstances from which they may be inferred are various. They may consist of previous threats of the prisoner to kill the man who was killed, preparation of weapons, search for the man who was afterwards killed, absence of provocation just before and at the time of the killing, dangerous nature of the weapon used to kill,¹ the manner of using it, and the subsequent expressions of gratification by the prisoner over the killing of the deceased, if you find such facts have been proved. It is hardly necessary to add that the purpose to kill, malice, deliberation, and premeditation are all material facts and require to be found proved, in a case like this, beyond a reasonable doubt.²

¹ Use of deadly weapon does not raise a presumption of malice and intent to kill, but the jury must consider all the circumstances. *Erwin v. State*, 29 O. S. 186.

² *D. F. Pugh, J.*, in the *Elliott* case.

Sec. 1868. Person presumes reasonable consequences of his acts.

But the law presumes that every person intends the natural, probable, and reasonable consequences of his own acts intentionally done. "Wrongful acts, knowingly or intentionally committed, can neither be justified nor excused on the ground of innocent intent. The color of the act determines the complexion of the intention." To illustrate part of this rule, if a person voluntarily or intentionally does an act, or aids, assists, and encourages another to do an act, whose natural, reasonable and probable tendency is to destroy another's life, the conclusion may be drawn that he intended to destroy that life.¹

¹ *D. F. Pugh, J.*, in the *Elliott* case. "As a rule of evidence, a party is presumed to intend the natural consequences of his own acts." *Robbins v. State*, 8 O. S. 131.

Sec. 1869. Manslaughter—What is—Provocation

What are the circumstances which will repel the imputation and inference of malice that grows out of an intentional killing, and will reduce the offense from murder to manslaughter?

The absence of malice is the trait of a case of homicide which makes it manslaughter.

When a person is killed "under the influence of passion, or in the heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time for the blood to cool and reason to resume its habitual control, and is the result of temporary excitement by which the control of reason was disturbed rather than by wickedness of heart, or cruelty, or recklessness of disposition," it is only manslaughter.¹

When the killing is done under such circumstances, the law in its leniency imputes it to be the infirmity of human nature and not to the malignity of the heart.

One of the established rules of law is that the act of killing, or aiding or assisting in killing, to be manslaughter must be directly caused by the passion arising out of the provocation. It was not sufficient that the prisoner's mind was agitated by passion arising from some other provocation, or provocation given by some other person.

Another rule is that the provocation must have been given at the time of the commission of the offense, or so short a time before that there was not time for the blood to cool and reason to resume her empire over the mind.

It has been said that it (provocation) is whatever will "commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of reflection."²

The provocation must be in itself "calculated to provoke a great degree of resentment," and such as ordinarily superinduces a great degree of violence. If it is so slight and trivial that a great degree of violence does not usually follow, it is not reasonable provocation.

It has also been said by an able judge that, in a case like this, the jury "should take into consideration all the circumstances preceding, as well as attending the commission of the homicide, and inquire what would ordinarily have been the conduct of men in general under like circumstances," and that should the jury "find that the defendant did no more than might be expected from men in general under like provocation, the law in its tenderness to human frailty would require"³ the jury to say that the killing was only manslaughter.⁴

¹ *Moher v. The People*, 10 Mich. 212.

² 13 Tex. App. 563.

³ *Gidding case*, 424.

⁴ *D. F. Pugh, J.*, in the *Elliott case*.

Sec. 1870. Manslaughter—Person present doing no overt act not aider.

"If the jury find from the evidence that the principal named in the indictment did take the life of the deceased, but did it in a sudden quarrel, or in the heat of passion, his offense would be but manslaughter; and if you further find that the defendant did no overt act and took no active part in the killing, but was merely present when the quarrel arose or fight began, you can not in such case find him guilty as an aider and abettor of the principal."¹

¹ *Goins v. State*, 46 O. S. 457.

Sec. 1871. Self-defense—Whether defendant believed he was about to be robbed—Burden of proof on defendant.

Evidence has been offered tending to show that the defendant assaulted the deceased with a club or some other instrument which resulted in his death. Evidence has also been offered tending to show in the affray which occurred on that occasion, the deceased first attacked and assaulted the defendant, and sought by force to take his money from him, or rob him, and, in order

to prevent the assault and taking his money by W., one or more of the defendant's associates, who were with him, struck W. with a club or other instrument and beat him off the defendant, and that the defendant did not strike W. Whether or not the facts or any of them just related, are proved by the evidence, are matters for your determination. If you find that W. first attacked the defendant, and sought forcibly to take his money from him, or to rob him, and that the defendant, or his said associates who saw the attack, in good faith believed and had reasonable ground to believe that defendant was being assaulted with a view of feloniously taking his money and robbing him, or that the defendant was in imminent danger of death or great bodily harm, the defendant or one or more of his said associates had the right to use the necessary force to repel the attack upon defendant and to prevent the unlawful taking of his money, even to the taking of assailant's life. And this is so, even though the defendant, if he struck the fatal blow, or one or more of his associates, if they or any of them did it, were mistaken as to the felonious attempt to rob the defendant, or as to the existence or imminence of the danger.

You will, therefore, inquire, if you find that the defendant struck the fatal blow or blows, whether or not the defendant at the time, in the careful and proper use of his faculties, in good faith believed and had reasonable ground to believe that a felonious assault was being made upon him by W. to rob him of his money, or that he was in imminent danger of death or great bodily harm, and that his only means of preventing such assault or escape from such danger, was by taking the life of the said W. If defendant so believed, and, under all the circumstances then surrounding him, he had reasonable ground to so believe, then you should find that he was justified in taking the life of decedent and your verdict should be not guilty. You will observe, however, that the mere belief of defendant, if he had such, was not sufficient to justify the taking of decedent's life, but to that must be added that he had reasonable grounds for such belief.

In regard to the amount of force necessary for such purpose, the law does not measure nicely the degree of force which may be employed under such circumstances, and if more force was used than was necessary, the law does not hold one responsible for it unless it was so disproportionate to the apparent danger as to show wantonness, revenge, or malicious purpose to injure the assailant.

If you find, however, that W. was not the first assailant, or did not attack the defendant with the view of feloniously taking his money from him, or robbing him, or causing his death, or producing great bodily harm upon him, and that the defendant neither believed, nor had reasonable ground to believe, that W. made such assault or attack upon him, then the defendant's right of self-defense can not avail him.

The burden of establishing the defense of self-defense is upon the defendant, and to entitle him to an acquittal upon this ground, this defense must be established by a preponderance, that is to say, the greater weight of the evidence.

If, however, upon the whole testimony, including the evidence relating to self-defense, you have a reasonable doubt as to the defendant's guilt, either of murder in the second degree or of manslaughter, or of assault and battery, or of simply assault, it will be your duty to acquit the defendant.

Evidence has been introduced as to the reputation of the deceased for honesty. The object of this evidence is to reflect upon the question of W.'s having attacked the defendant with a view to feloniously take from him his money or to rob him. However, if you find that W. had a good reputation for honesty prior to the alleged affray, nevertheless, if you find that W. did feloniously assault the defendant with the view of taking his money or robbing him, and the defendant did defend himself against such assault, then W.'s prior reputation for honesty will avail nothing.¹

¹ State v. Orris, Franklin Co. Com. Pleas. Kinkead, J.

Sec. 1872. Self-defense in self-protection against riotous strikers attempting to stop defendant from working.

It is claimed by defendant, however, 1st. That such killing was justifiable on his part in order to protect himself from being killed, or from great bodily harm. 2d. That, at the time the fatal shot was fired, by reason of the injuries he had received at the hands of the mob, his reason was gone, he had lost the control of his faculties, and was incapable of forming an intention to commit a crime; in other words, he claims that he was temporarily insane, and did not understand and appreciate the nature of what he was doing and that it was wrong. 1st. As to the question of self-defense. It appears in evidence in this case that the defendant was employed by a contractor to fill the trenches in the Town of ——. It also appears in evidence that the deceased, A. S., and a number of other laborers, who had been previously employed as trench diggers, had gotten into a dispute with their employer and had gone on a strike, and it was their combined purpose to permit no other person to perform any labor upon the contract till the matter in dispute between them and their employer was settled. And pursuant to this purpose, they went to the place defendant was employed and ordered him to stop work. This, it seems, he refused to do. The defendant had a right to solicit employment of the contractor and was guilty of no wrong when he accepted such employment and entered upon the discharge of his duties; (and I say to you) the deceased, A. S., and those engaged with him, when they assembled and went to the defendant and ordered him to cease work, became rioters and were guilty of an infraction of the laws of Ohio. They had no right to demand that the defendant cease work, and he was under no obligations to obey them when they did so order him. And if they assaulted him to compel him to desist, it was his right to repel the assault with force. He was under no obligation to retreat; and he had a right to use sufficient force to compel them to desist from their assaults upon him—even by taking the life of his assailants, or some of

them, if that was apparently necessary in order to preserve his own life, or to protect himself from great bodily harm at the hands of the mob.

It is claimed, however, on the part of the state, that this shooting was done by defendant out of a spirit of malice, wantonness, and revenge, growing out of the punishment he had received at the hands of the mob.

(a) *Burden of proving self-defense by preponderance.* Before proceeding further, I wish to say, however, that the burden is on the defendant to prove to you by a preponderance of evidence, either that he was justified in killing the deceased, or that he had temporarily lost the use of his faculties and did not appreciate and understand the nature of the act he was performing. By a preponderance of evidence, I mean the greater weight of the testimony, or, to state it in another form, if, after considering the evidence in all its bearings, you are of the opinion that the probabilities are in favor of the claims made on the part of the defendant, either that he was justified in doing the shooting, or that he had temporarily lost the use of his faculties so that he did not understand and appreciate the nature of the act he was performing, then the preponderance of the evidence would be made out, and your verdict, in that event, must be not guilty. But if the evidence was equally balanced, or the greater weight is with the state, then the defendant would not have the preponderance of evidence upon those claims.

As to the question of self-defense. The defendant had a right honestly and in good faith to solicit employment, and he had a right to engage in that employment, even though he had information that it was the purpose of the strikers to stop all persons from working.

Honest labor is a laudable employment, and no person shall be discouraged from engaging therein. Not only did he have a right to seek employment and engage therein notwithstanding the threats of the mob, but he had a right to arm himself for his own protection, however, with this qualification always in view: the employment must have been sought honestly and in

good faith, with the single purpose in view of performing the labor for the wages agreed upon, and he must not have sought employment and engaged therein as a mere subterfuge for the purpose of inciting an attack from the mob. No person must seek and court a controversy, for if he does, he must take the consequences flowing therefrom. Evidence has been offered on the part of the defendant tending to show that when he turned over his scraper, started to hitch a tug, and resume work, one T., a member of the mob, attacked him, and that he was immediately set upon by other members of the mob with deadly weapons, and it is claimed on the part of the defense that he was compelled to use a deadly weapon in order to save his own life, or to protect himself from great bodily harm. If the defendant did not purposely and intentionally bring on the assault, then I say, if, in the careful and proper use of his faculties, he believed and had reasonable ground to believe that he was in imminent danger of death or great bodily harm, and that his only means of escape was by taking the life of his assailants, or some of them, he was justified in taking the life of the deceased, A. S., even though in fact he was mistaken as to the existence of danger. In times of great excitement and apparent danger, where a person is called upon to act quickly, the same degree of prudence and judgment is not required of him that would be required had he an opportunity to deliberate upon his act. If, under the rules I have given you, you find that the defendant was justified in firing the fatal shot which resulted in the death of A. S., you need go no further, but your verdict will be not guilty. If, however, you find the defendant was not justified under the rules already announced in taking the life of A. S., then you will inquire further. Had the defendant so lost the use of his faculties, by reason of the injuries he had received at the hands of the mob, that he did not appreciate and understand the nature of the act he was performing, and that it was wrong? If he was in such condition of mind by reason of the injuries he had received as to deprive him of the ability to reason and to consider, and to know what he was doing, and the fatal shot

was fired while he was in such condition, then he would be guilty of no crime, and your verdict should be not guilty. He is not entitled to an acquittal, however, on the ground of mental incapacity, if at the time of the shooting he had sufficient mental capacity and reason left to enable him to distinguish between right and wrong, and understand and appreciate the nature of his act and his relation to the party injured.¹

¹ Sheets, J., in *State v. Van Skiver*, Auglaize Co. Com. Pleas.

Sec. 1873. Self-defense, in ejecting one from saloon.

If the jury should be of the opinion that although the defendant M. undertook to eject the deceased and others from the saloon, and that while either or both were in the act of ejecting the deceased, that the deceased resisted and made a violent attack upon the defendant, you will then determine whether the defendant alone, or acting jointly with M., took the life of the deceased in the exercise of what is known in law as the right of self-defense.

When a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant to save his own life or prevent enormous bodily harm.

Homicide is justifiable on the ground of self-defense, where the slayer, in the careful and proper use of his faculties, in good faith believes, and has reasonable ground to believe, that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in fact he is mistaken as to the existence or imminence of the danger.

In considering the question as to whether or not under the facts and circumstances as shown by the evidence in this case, the defendant was acting in defense of his own life or body, the jury will be called upon to determine who was the aggressor, that is, whether the deceased M. was the aggressor or whether the

defendant himself was the one who was responsible for the beginning of the trouble. If the jury should be of the opinion from the evidence that the defendant was the aggressor and that he undertook to do injury to the deceased without just cause, then you will be called upon to apply the following rule of law: There is a distinction between the case of a person driven to the necessity of taking life in self-defense in a conflict provoked and incited by his own wrong and that of one reduced to such necessity in a conflict that was neither sought nor provoked by him. In the case when a party assaulted is in the wrong, he must, before taking the life of his assailant, to save his own life or to avoid great bodily injury, flee as far as he conveniently can, either by reason of some wall or other impediment, or as far as the fierceness of the assault will permit, for it may be so fierce as to not allow him to yield a step without manifest danger to his life or great bodily harm, and then, in his defense, he may kill his assailant instantly.

If on the other hand, the jury should be of the opinion that the defendant in this case was in pursuit of his right to reasonably eject the deceased from the room for some disorder, and that, therefore, he was not in the wrong, or he neither provoked nor incited the conflict, but was assailed while in the pursuit of this purpose to eject the deceased from the room, then the jury are instructed that the defendant had the right, without retreating a step, to kill his assailant, if necessary, to protect his own life or to avoid grievous bodily harm.

The danger must in either case be actual or apparent, and the party killing must have honestly believed that he was in danger of losing his own life, or of suffering some great bodily harm, before killing his assailant. And it is not enough that the party killing honestly believed that there was imminent danger to himself, but the circumstances must have been such as would have afforded a reasonable ground for such belief. Of this the jury must judge from the circumstances as developed by the testimony. If the appearances were such as would have alarmed a man of ordinary firmness and would have impressed

him that such danger was imminent, and if the assailed party honestly believed such to be the case, it is not material whether the danger was real or not.

Thus, to make the application to this case, if you should be of the opinion that the deceased had a revolver in his hand; that there was an apparent purpose on his part to use it on the body of the defendant, and that the defendant, as would any man of ordinary firmness, then honestly believed that the deceased intended to instantly kill or seriously wound him, in such case the jury will determine whether or not the defendant had a reasonable ground to believe that his life was in danger, and whether or not he took the life of the deceased in defense of his body or his own life.

The burden of establishing the defense of self-defense is upon the defendant and to entitle him to an acquittal upon this ground, this defense must be established by a preponderance, that is, by the greater weight of the evidence.

The law does not measure nicely the degree of force which may be employed by a person attacked, and, if he uses more force than is necessary, he is not responsible for it, unless it is so disproportionate to his apparent danger as to show wantonness, revenge or a malicious purpose to injure the assailant.

The defendant claims that the deceased used vile and reproachful language toward him; that he insulted him, and was disorderly in his house. If you find from the evidence that this is true, the defendant, who was conducting a place of public resort, would have the right to put the deceased out of his house, or order him out of his house, but he would only have the right to use ordinary force, or such force as was necessary to eject the deceased from his house. The right to order the deceased out or the right to put the deceased out does not carry with it the right to kill the deceased, if he refused to go out. This right of the defendant to eject the deceased from his house does not in any manner change the rule of self-defense or the right to kill, as I have given it to you.

If you find from the evidence that defendant used force and violence disproportionate to the defendant's apparent danger,

in attempting to eject said M. from the saloon, if such you find and more force than the circumstances show and indicate to be necessary, and if there was resistance by said M., or if there was an attack by said M., or by said M. and another person, and if the circumstances do not show any reasonable apprehension of loss of life, or of great bodily harm to the defendant by such resistance or attack, if any, by said M., or by said M. and another person, on defendant, and if under such circumstances defendant shot and killed said M., then I charge you that the defendant was not justified in taking the life of said M., and if you find, under the instructions heretofore given you, that the defendant shot and killed said M. purposely and maliciously, with intent to kill said M., the defendant would be guilty of murder in the second degree, and you should, in that event, so find your verdict. If you find from the evidence, and under the instructions I have given you, that said M. came to his death by means of a shot discharged from a revolver, unlawfully but without malice, pointed or aimed by the defendant at or towards said M., then, and in that event, the defendant would not be guilty of murder in the second degree, but he would be guilty of manslaughter, and you should so find by your verdict.¹

¹ State v. Simi, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1874. Self-defense—What constitutes—Another form.

Under certain defined circumstances, the laws of God and man give the right to take life in self-defense.

“When a person in the lawful pursuit of his business, and without blame, is violently assaulted by one who manifestly and maliciously intends and endeavors to kill him, the person so assaulted, without retreating, although it be in his power to do so without increasing his danger, may kill his assailant to save his own life, or prevent enormous bodily harm.”¹

“Homicide is justifiable on the ground of self-defense, where the slayer, in the careful and proper use of his faculties, *bona fide* believes, and has reasonable ground to believe that he is in imminent danger of death or great bodily harm, and that his

only means of escape from such danger will be by taking the life of his assailant, although in fact he is mistaken as to the existence or imminence of the danger.'''²

The claim of self-defense implies, presupposes, that O. was intentionally killed. It is plain that when one kills another in self-defense he intends to do it, but it would not be unlawful killing, although intentionally done.

Before you can acquit the prisoner on the ground of self-defense, you must be satisfied that several facts, which I shall now enumerate and explain, were, by the evidence, proved.

1. You must be satisfied that O. was the assailant; that he began the shooting.

2. You must be satisfied that O. manifestly and maliciously intended and endeavored to kill or do great bodily harm to the prisoner and P. E., or one of them. Did O. intend to do that? And in doing it, was he actuated by malice? Or was he simply defending himself? Trying to save his own life? These are the questions for your determination under this head.

3. You must be satisfied that the prisoner, in good faith, believed, and had reasonable grounds for believing that he was in danger of losing life, or sustaining great bodily harm from the violence of O. That belief must have been honest and sincere. The bare belief, however, was not sufficient; there must have been reasonable grounds for believing that there was such danger, and they must have acted under the influence of such belief alone. In determining whether there were such reasonable grounds for the belief you are not to conceive of some ideal reasonable person, but you should, as nearly as possible put yourselves in their position, with their physical and mental equipment, surrounded with the circumstances with which they were surrounded, and exposed to the influences to which they were exposed. Does the evidence show that they had such reasonable grounds for believing that O. was about to take their lives, or the life of one of them, or to do great bodily harm to them or one of them, just before and at the time he was killed?

4. You must be satisfied that the danger of losing their lives, or the life of one of them, or of both or one of them sustaining great bodily harm at the hands of O. was, at that time, actually or apparently imminent and irremediable. The law regards human life as the most sacred of human interests committed to its protection, and there can be no successful interposition of self-defense unless the necessity for taking O.'s life was, at least, apparently pressing and urgent at that time—unless, in a word, the taking of his life was the reasonable resort of the prisoner, or one of them to save their own lives, or the life of one of them, or to avert great bodily harm to both, or one of them. It is true they had a right to act upon appearances—upon such appearances as would induce a reasonable person in their position to believe that there was such immediate danger, and that if the appearance turned out to be fallacious they were not to be blamed.

5. You must be satisfied that the killing of O. was the only means of escape from the danger mentioned. If O.'s life was taken after the appearance of danger disappeared, the claim of self-defense must not be allowed. Although O. may have been the aggressor, although he may have begun the shooting, yet, if you find that the danger of death, or of great bodily harm from O. could have been escaped from, could have been avoided, without taking his life, the prisoner can not shelter himself behind the law of self-defense; it is no defense in such case.

6. You must be satisfied that they were without blame, without fault. The law of self-defense does not imply the right of attack, nor does it permit a man to kill another for revenge.³

¹ *Erwin v. State*, 29 O. S. 187.

² *Marts v. State*, 26 O. S. 162; *Darling v. Williams*, 35 O. S. 59.

³ *D. F. Pugh, J., State v. Elliott*. Approved by Sup. Court.

Sec. 1875. When a person may take the life of an assailant in self-defense—A different form—Giddings case.

It is a part of the law of this state, as well as of other states and countries, that, under certain defined circumstances, a per-

son may, in self-defense of his own life, or to avoid great bodily harm, take the life of an assailant. And when this right is legitimately exercised, the homicide so committed, whether justifiable or excusable, according to the distinction at common law, it not an unlawful taking of life; and is, therefore, neither murder nor manslaughter. This right constitutes the boundary line between manslaughter and a lawful homicide.

It is generally agreed that the right of self-defense is founded in nature and is one of the rights not surrendered to society according to the theory of the social compact. But in a state of society it is necessarily so far modified by the laws as to be limited to the cases where it would result in imminent danger to life, or of great bodily harm, if the only remedy of the peaceable and well-disposed citizen lay in an appeal to the laws, or the strong arm of the state. If the exercise of the right were not thus restricted, violence would beget violence, and there would be an end of civil government. There must, however, be imminent danger to life or of great bodily harm, before the taking of life in self-defense can be resorted to by anyone in any case.

But reason suggests and the law makes a distinction between the case of a person driven to the necessity of taking life in self-defense in a conflict provoked and incited by his own wrong, and that of one reduced to such necessity in a conflict that was neither sought nor provoked by him. In the case *when a party assaulted is in the wrong*, he must, before taking the life of his assailant to save his own life or to avoid great bodily injury, flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit, for it may be so fierce as not to allow him to yield a step without manifest danger to his life or great bodily harm, and then, in his defense, he may kill his assailant instantly.¹

But in a case where the assailed party is not in the wrong, neither provoked nor incited the conflict, and was assailed while in the pursuit of his lawful business, he may, without retreating

a step, kill his assailant if necessary to protect his own life, or to avoid grievous bodily harm.

The danger must in either case be actual or apparent, and the party killing must have honestly believed that he was in danger of losing his own life, or of suffering some great bodily harm, before killing his assailant. And it is not enough that the party killing honestly believed that there was imminent danger to himself, the circumstances must have been such as would have afforded a reasonable ground for such belief. Of this the jury must judge from the circumstances as developed by the testimony. If the appearances were such as would have alarmed a man of ordinary firmness, and have impressed him that such danger was imminent; and if the assailed party honestly believed such to be the case, it is not material whether the danger was real or not. Thus, to make the application to this case, if you should find that the deceased threatened to kill the defendant, and, suiting his act to his word, hastily reached with his right hand to his hip-pocket, as if to draw and use a deadly weapon, and that the defendant, as would any man of ordinary firmness, then honestly believed that the deceased intended to instantly kill or seriously wound him, in such case it is not material to the defendant's right of self-defense whether, as a matter of fact, the deceased had or had not a weapon.

If, when violently assaulted, a party were required to act at his peril in judging whether there was real ground for apprehending imminent danger, before resorting to such measures as the circumstance seemed to require for his safety and protection, it might be as hazardous to defend himself in the first instance as to risk the ultimate result of what appeared to be a violent and malicious assault upon his person and life; and he might escape from what appeared to be the imminent danger to be tried and condemned as a man-slayer, where, had the facts been what the circumstances indicated, he would be excused.²

¹ *Stoffer v. State*, 15 O. S. 47.

² *Thad. A. Minshall, J.*, in the *Giddings trial*, 29 O. S. 187, 26 O. S. 162, 35 O. S. 59.

Sec. 1876. Right to repel assault.

“If the defendant and his co-defendants were in the exercise of their lawful rights in passing along the streets at the time of the conflict wherein one was killed, and neither of the accused parties began the affray or attack, then the defendant and those accused with him had the right to repel the assault with such force as was necessary to do so, and had a right to defend themselves from danger to life or great bodily harm; and if they were suddenly assailed or surrounded by superior numbers armed with weapons dangerous to life, or calculated to do great bodily harm, the defendants had a right to stand on their defense, to repel force by force, even to the taking of life, if they believed and had reasonable grounds to believe that it was necessary to do so to prevent either death or great bodily harm to themselves, and if necessary they may use such weapons as will accomplish the purpose.”¹

¹ From *Goins v. State*, 46 O. S. 457.

Sec. 1877. Son may defend parent.

A son has the right to commit an assault in the defense of his mother, if the mother be not in the wrong. If at the time a son does commit an assault in the defense of his mother while she is using such means as are necessary to repel an assailant from entering her home, or to prevent such person from forcibly entering her home, such assault, if so made by the son, where he, in the careful and proper use of his faculties, in good faith believes and has reasonable ground to believe that his mother is in imminent danger of great bodily harm, and that her only means of escape from such danger will be by the son taking the life of such person, the son does not thereby commit an unlawful act, even though in fact the son be mistaken as to the existence or imminence of the danger. So, in this case, if you are satisfied from the evidence that the defendant, M. M., was assaulting the deceased to prevent him from entering her home forcibly and against her will, and that during the time of such conflict

the defendant, S. M., in the careful and proper use of his faculties, in good faith believed and had reasonable ground to believe that M. M. was in imminent danger of great bodily harm, and that her only means of escape from such danger was by committing the assault that he did commit, then S. M. is guilty of neither murder nor manslaughter, and as to him, your verdict must be accordingly, even though S. M. was in fact mistaken as to the existence or imminence of such danger to his mother. But you must be satisfied that S. M. believed in good faith that M. M. was in danger of great bodily harm from the decedent, there must have been reasonable grounds for believing that there was such danger, and that belief must have been honest and sincere; the bare belief is not sufficient; and he must have acted under the influence of such belief alone. And in determining whether there were such reasonable grounds for the belief, you should, as nearly as possible, according as disclosed by the evidence, put yourself in their position, with their physical and mental equipments, surrounded with the circumstances with which they were surrounded. Does the evidence show that he had such reasonable grounds for believing that the deceased was about to do her great bodily harm? Consider the evidence as to the conduct of the parties at the time and immediately previous to the acts which resulted in the death of the decedent.¹

¹ Melhorn, J., in *State v. Miner*. The killing of a person in defense of those standing in the relation of husband and wife, parent and child, etc., is regarded in law as the act of the person defended, and is excused to the same extent as if in fact committed by him. Clark's Cr. L., 157, and cases cited; 1 Bishop's Crim. Law, sec. 877.

Sec. 1878. Justifiable homicide.

Homicide is justifiable on the grounds of self-defense when the slayer, in the careful and proper use of his faculties *bona fide*, believes and has reasonable ground to believe that he or his family is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of the assailant, although in fact he is mistaken

as to the extent or imminence of the danger; and where one is assaulted in his own home, or the house itself attacked, he may use such means as are necessary to repel the assailant, or to prevent his forcible entry or material injury to his home, even to the taking of life. But a homicide in such a case would not be justified unless the slayer, in the careful and proper use of his faculties, in good faith believes and has reasonable ground to believe that the killing is necessary to repel the assault or prevent his forcible entry.¹

¹ Melhorn, J., in *State v. Mary Miner, et al.* Defense of self or home. *State v. Peacock*, 40 O. S. 333.

Sec. 1879. Common defense from attack.

“If the only purpose made known to the defendant prior to the killing of the deceased, and the only one contemplated or entered upon by him, was a defense of himself and companions from an attack by a party of men superior in numbers and strength which had been threatened, and neither the defendant nor his comrades were to be aggressors or attack the opposing party, then such common purpose of defense merely was not unlawful and criminal.”¹

¹ From *Goins v. State*, 46 O. S. 457.

Sec. 1880. Evidence of previous character and reputation in homicide.

The defendant has placed his previous character and reputation as to being a man of peace and quiet in evidence. If you find that previous to this difficulty he sustained a good reputation for peace and quiet, you will weigh it in his favor for what you, in your honest judgments, may think it is worth. Where the question to be determined by you may be close, it should be sufficient to turn the scale in his favor.

It not only sheds light upon the subject of inquiry, but it is also admitted as a rule of public policy, as a reward held forth by the law to those who, by conformity to its commands, establish characters for peace and quiet. Where one who has estab-

lished such a character by his conduct as a good citizen may use it in repelling the charge of crime, he will also be the more careful not only to form it, but also to retain it. It is, however, only a circumstance favorable to his innocence. As a general rule, a man's character for anything is the outgrowth of what he is, and if by his conduct and deportment among his fellows he has earned the reputation of being a man of peace and quiet, it affords grounds for believing that he is what, by his conduct, he seems to be; and the impartial mind is the less ready to conclude that such a one has acted contrary to what may seem to be a law of his life.

The weight to be given to the hitherto good character of the defendant for peace and quiet must be such as the jury, under all the circumstances, think it should receive. It is very relevant to, and of much weight upon the question of malice; for the existence of such a character can not consist with the element of malice until it has been uprooted and destroyed. It is also quite relevant to the question whether the defendant, in committing the homicide, acted in self-defense; for here, again, he could not, without honestly believing that he was in imminent danger of great bodily harm or loss of life, have taken the life of his fellow if he was by habit a peaceful and quiet man.¹

¹ Thad. A. Minshall, J., in the Giddings case.

CHAPTER CVIII.

INSANITY.

SEC.

1881. Insanity — A comprehensive presentation.

1882. Insanity defined.

SEC.

1883. Insanity as a defense.

1884. Burden of proving insanity.

Sec. 1881. Insanity—A comprehensive presentation.

1. *Medical insanity.*

2. *Legal tests.*

The state has no interest in the conviction and punishment of an irresponsible person, and those taking part in the administration of justice have no desire to visit the penalty of the law upon such a person; it would afford no example to others, nor would it deter others from the commission of a crime. On the other hand, the state is zealous that no mistakes shall be made on the side of mercy which will defeat justice and detract from the majesty of the law.

In the administration of the law difficulty is encountered in dealing with the subject of insanity, which is due to the imperfect knowledge upon the subject among medical men, lawyers, courts, jurors and men in general. In medical science different shades and degrees or kinds of insanity are recognized, such as temporary or emotional insanity, impulsive insanity, homicidal insanity, irresistible impulse, and others. Medical men sometimes express regret that courts do not recognize the degrees of irresponsibility adopted in medical science. The law does not so recognize them. Medical insanity, so called, can not be said to be legal insanity.¹ The law has adopted what seems to be the true tests for determining the legal responsibility of one charged with crime, and it is a matter for the sole determination by the jury. The law proceeds upon the theory that a

¹ 7 N. P. 547, 5 C. C. 74, 22 O. S. 90.

man having intellect and reason may control and keep within prescribed bounds any natural instinct or propensity of which they may be possessed; and when they do not do so, and by their conduct and acts infringe upon some law, the inquiry by the jury, whose sole province it is to determine the mental responsibility when it is brought in question, may be along two lines. The jury will endeavor to discover from the proof which is laid before it, whether the brain of the accused was, at the time of the commission of the act charged as criminal, so disordered in its functions as to destroy the power to control the mind or will and his acts. The jury will determine whether the accused, instead of having a diseased brain, was actuated by excitement, or highly nervous conditions from worry, or by passions and angered feelings, or revenge, produced by motives of anger, hatred or revenge. If the alleged insanity does not appear by the evidence to be of a marked character, and is set up as a defense to a charge of murder, it is incumbent upon the jury to move with caution, and carefully weigh every circumstance that may shed any light upon the question. In determining whether the defendant was insane at the time of the alleged killing of A., the jury may consider all his acts at the time of, before, and since the alleged commission of the act, as such acts and conduct have been shown by the evidence, and the jury have the right to consider the defendant's appearance and actions during the trial as a circumstance in determining the insanity at the time of the alleged homicide.¹

The law permits men and women who have known the accused and who have had opportunity to learn of and observe the acts, conduct, and appearance of the accused, upon first giving their testimony as to these matters, to then give you the benefit of their opinion as to the mental condition of the accused, based upon such facts.

Testimony of physicians, men specially learned in the diseases of the mind, have been called to give their opinions based upon their observation of and knowledge of acts, appearance and conduct of the defendant. This you are to consider with all the other evidence offered on the subject.

The jury may also consider the testimony as to the mental condition of the ancestry of the defendant. In a word, all the testimony which the court admitted to be carefully considered and weighed by you, and the mental condition of the defendant at the time of the commission of the act charged in the indictment determined therefrom.

A sane man is one whose senses bear truthful evidence; whose understanding is capable of receiving that evidence; whose reason can draw proper conclusions from the truthful evidence thus received; whose will can guide the right and wrong growing out of that thought; whose mental sense can determine the right and wrong growing out of that thought; and whose act, at his own pleasure, be in conformity to all these.

A person who is possessed with the power to determine the right and wrong so far as it relates to his duty, under the conditions and circumstances of the transaction giving rise to the question of his duty from which his sanity arises as a question for determination, and who has the power of will to enable him to pursue right and to reject the wrong, is to be regarded as a rational being. One who is without these faculties of the mind and power of the will, is not to be regarded as a rational being, and may not in law be held responsible for what he does.

Insanity means such a perverted and deranged condition of the mental and moral faculties as to render a person incapable of distinguishing between right and wrong, or not conscious at the time of the nature of the act which he is committing; and where, though conscious of it, and able to distinguish between right and wrong, and knowing that the act is wrong, yet his will—by which is meant the governing power of his mind—has been otherwise than voluntarily so completely destroyed that his actions are not subject to it, but are beyond his control.²

The jury will bear in mind in the consideration of this question the statement heretofore made to the effect that medical insanity is not legal insanity. The court makes the further suggestion in this connection that the law permits and requires that you apply all tests whether coming from medical science

or medical aid, or from the testimony of those who have testified in this case, in determining upon the sanity of the defendant. The lack of certainty and of definite knowledge of the subject of insanity has prompted the law to adopt the rule of evidence that the insanity must be shown by a preponderance of the evidence.

The real test of legal responsibility, sanctioned by the high judicial authority, is whether at the time of the homicide the brain of the defendant was partially deranged or diseased from some cause, whether such disease or derangement had taken charge of his brain, and had so impelled it that for the time being his will power, judgment, reflection and control of his mental faculties were so impaired that the act done was the result of an impulse which a diseased or deranged mind was unable for the time to control. If the jury believe from the evidence that there was at the time of the commission of the act charged, that there was at the time some excitement of the mind of the defendant which prompted some unpremeditated action or some spontaneous inclination to do the act, which you believe from the evidence to have arisen from some outer influence of mental derangement, and not directly from feelings of passion, anger and revenge of a sane mind, and which the mind of the defendant could not and did not successfully resist and control, then the jury may find the defendant not guilty of the crime and may render a verdict of not guilty.

If you find, according to the requisite degree of evidence, that at the time of the act, the mind of the defendant was not acting under the influence of some outer influence of mental derangement, but, on the other hand, that his mind was operating under the influence of feelings of passion, anger and revenge, and not mental derangement, you may in such event arrive at the conclusion that he was sane, and proceed with the further investigation of the questions involved.

You are not required to decide whether or not the defendant is insane at the present time.³

Finally, gentlemen, on this subject, the question of the insanity of the defendant has exclusive reference to the act with which

he is charged and the time of the commission of the same. If he was sane at the time of the commission of the act, he is punishable by law. If he was insane at the time of the commission of the act, he is entitled to be acquitted. A safe and reasonable test is that whenever it shall appear from all the evidence that at the time of committing the act the defendant was sane, he will be amenable to the law. Whether the insanity be general or partial, whether continuous or periodical, according to terms in medical science, the law recognizing only mental irresponsibility at the time of the act, it must be made to appear to the jury that the mental unsoundness controlled the will of the accused at the time of the commission of the act.⁴

If upon due consideration of the evidence on the question of insanity you are of the opinion that the defendant was sane at the time of the commission of the act charged against him in the indictment, you will then proceed to the further consideration of the issues presented by the pleading of not guilty.⁵

¹ Sackett Instrs., sec. 2572, 125 Cal. 489.

² *Lowe v. State*, 118 Wis. 641; *Dans v. United States*, 165 U. S. 373.

³ 135 Cal. 489.

⁴ *Hotema v. United States*, 186 U. S. 413; Sackett Inst., sec. 2570.

⁵ *State v. Cly*, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1882. Insanity defined.

Insanity has been defined to be a disease of the mind; a disease of the organ that thinks, but what is mind? What is the organ that thinks? It is the subtle essence which is not cognizant to the senses of the outsider or the observer. It can not be subjected to analysis as long as it is living. It can not be inspected by either lens or microscope, or measured by any instruments. "The molecular changes which accompany thought cease at death," and while living, the physical functions of the brain can only be guessed at. It has been claimed that insanity is such a derangement of the mental faculties of the person whose sanity is in question that he is unable to reason correctly. But it differs so much in kind and degree that medical science has never been able to formulate a definition precise

enough to be useful in the varying circumstances of each individual case. Medical men whose labors and studies are in the line of mental disorders do not agree upon a definition of insanity, or as to the existence of it in any particular case. Dr. Hammond, in his work of *Diseases of the Nervous System*, defines insanity to be: "A manifestation of disease of the mind characterized by a general or partial derangement of one or more of the faculties of the mind, and in which, while consciousness is not abolished, mental freedom is perverted, weakened, or destroyed." This is too abstract and general for practical purposes. What we want is a working definition, a legal definition, a definition that will aid us in forming a careful judgment in this case. The law supplies that want. The law's definition of insanity, however, does not harmonize with the conclusions of medical science. The observations and language of another judge which are apropos in this proceeding: "On both sides of an invisible line are multitudes of cases where it is impossible to say with confidence whether the mind is sane or insane. But when the question of responsibility is presented to a court there is an imperative necessity for deciding, and the further necessity of deciding it by rule. An arbitrary line, if none can be discovered, must be drawn. It must be drawn so as to be certain, comprehensible, and broad; certain enough for the conduct of life; comprehensive enough to be clearly explained to a jury of twelve plain men; and broad enough to cover many cases without confusing unskilled minds with minute distinctions. The refinements of medical science must be pretermitted. The first necessity in the administration of justice must be considered, and that is the safety of the community, the protection of the greater and more valuable portion of the community who are not insane. A rule must be laid down which will not have the effect of letting criminals escape punishment through the bewilderment of juries. Tenderness to the weak, however commendable in itself, is not to be so stretched as to endanger the lives or even the property of the public." These are some of

the reasons which inspired and made a legal definition of insanity a virtue of necessity and a dictate of wisdom.¹

¹ Pugh, J., in *State v. Kalb*, Franklin Co. Com. Pleas. For interesting cases defining insanity, see *Com v. Rogers*, 7 Metc. 500; *McNaghten's case*, 10 C. & F. 200; *State v. Felter*, 25 Ia. 68; *Parsons v. State*, 81 Ala. 577 (good case collecting cases); *Dunn v. People*, 109 Ill. 635; *Guiteau's case*, 10 Fed. 161.

Must be proved by a preponderance of the evidence and not merely creating a doubt, 12 O. 483, 2 O. S. 54, 10 O. S. 598, 23 O. S. 349, 31 O. S. 111, 4 C. C. 101.

A very instructive opinion on insanity is *Clark v. State*, 12 Ohio, 483, and Judge Birchard's instruction on page 495 of the report is a very good one to follow.

Sec. 1883. Insanity as a defense.

It is a well-understood rule of law that an insane person can not be convicted of a crime. The state has no interest in the conviction of an irresponsible person; it would offer no example to others, nor would it deter others from committing a crime any more than it would the punishment of a dumb brute. By reason of a lack of knowledge by men of science, as well as the legal fraternity, there is great difficulty in defining insanity in language which will include any and all cases. When insanity of a person is not of a marked character, and is set up as a defense to a charge of murder, courts and jury must move with caution, and carefully weigh every circumstance that may shed any light upon the question. It is conceded by the physicians that there is a form of mental disease called transitory insanity. It is said that it may be superinduced in various ways, and is more likely to occur in persons of a highly nervous temperament.

The perplexing question in regard to what may be termed transitory insanity is, that the subject may, as is said, be sane up to the moment of committing, and immediately after committing a crime. Whether such a form of insanity exists is a question of fact and not of law. It is a question which the jury must determine from the evidence, by the testimony of physicians of great experience in medical science, and those in particular who have devoted themselves to mental pathology, or diseases of

the mind. For it is an old maxim that credit is to be given to everyone for the knowledge he possesses in the practice of his own art.

A sane man is one whose senses bear truthful evidence; whose understanding is capable of receiving that evidence; whose reason can draw proper conclusions from the truthful evidence thus received; whose will can guide the thought thus obtained; whose moral sense can determine the right from the wrong growing out of that thought, and whose act can, at his own pleasure, be in conformity to all these. One not possessed of these faculties is not a sane man.

Hence the power to determine the right from the wrong in a given case, not in the abstract, but as applied to the particular parts and circumstances of that case, the case in which his sanity arises as a question for determination, together with the power of will, adequate to accept the right and reject the wrong, is a test of sanity or insanity.

One possessed of such faculties of the mind and power to determine and control his acts is a rational being, a free agent, a responsible subject of the law. One without these faculties of mind and power of will is not a rational being, and is not responsible for what he does. Courts in the main, judge of the mental condition of a man from the external indicia of the mind, in which they are consistent with all the analogies of the law of evidence.

Then if you find, by a preponderance of proof, that at the time the defendant shot and killed the deceased he was laboring under some mental infirmity, rendering him incapable of determining that it would be wrong to take the life of the deceased because he had been the occasion of his domestic troubles, that his duty to his fellowman required that he should abstain from so doing, that he would be punished by the laws if he killed him under such circumstances, and slew the deceased from the uncontrollable impulse of his mental disorder, without power or reason or will to see that it was wrong and abstain from doing it, not from the impulse of passion excited from his domestic

troubles, with which the deceased had been connected, then you should acquit him.

On the contrary, if you find that he did not know that it was wrong and punishable by the law, if he could have restrained himself, if it was not the impulse of his mental disorder, if it was the impulse of the passion of anger, or a feeling of malice excited by the wrongs he had suffered from the conduct of the deceased, then he was legally responsible; and if he intentionally killed W. he was guilty of manslaughter, if not more, unless he killed him in the lawful exercise of the right of self-defense.

All persons arrived at the usual years of discretion are presumed sane and accountable for what they do.

And when it is claimed that a party charged with crime is not sane he is not amenable to the law for what he does, the burden is placed on the defense by a preponderance of the evidence to establish this to the jury. And if this is not done the defense is to be rejected.¹

¹ Thad. A. Minshall, J., in the Giddings trial.

Sec. 1884. Burden of proving insanity.

“To defeat the legal presumption of sanity, which meets the defense of insanity at the threshold, the burden of establishing mental alienation of the accused affirmatively rests upon the accused.”¹

¹ From *Bergin v. The State*, 31 O. S. 111. This has long been the rule in Ohio as shown by the following cases: *Clark v. State*, 12 O. 483; *Leoffner v. The State*, 10 O. S. 599; *Silvus v. State*, 22 O. S. 90; *Bond v. The State*, 23 O. S. 349; *Weaver v. The State*, 24 O. S. 584.

CHAPTER CIX.

INSURANCE—FIRE, ACCIDENT, LIFE.

SEC.

1885. Burden on plaintiff to prove loss—Proof of loss—Or waiver of provision by defendant.

1886. Waiver of proofs of loss—Burden of proving authority of agent on plaintiff.

1887. Conditions as to time of proof of loss, and proof—When right to sue accrues—What is sufficient notice.

1888. Waiver of proofs of loss may be inferred from acts of company—Mere silence, nor sending agents to investigate, nor attempt to compromise, will not amount to waiver—What other acts in connection therewith will.

1889. Proof of loss—If policy of insurance destroyed it is duty of company to furnish copy of information—Failure on its part may estop the company from claiming proofs not in time.

1890. Burden of proof in action for loss by fire—Proofs of loss.

1891. Insurance of partnership property—Was partnership dissolved at time insurance issued—Representation as to ownership of property.

SEC.

1892. Vacancy of property—Breach of condition as to.

1893. When is a building vacant or unoccupied.

1894. Vacancy—Waiver of forfeiture by reason of vacancy of premises—Burden of proof.

1895. Total or partial loss.

1896. Compromise of loss obtained under duress.

1897. Evidence as to value of property as reflecting on charge of destroying property.

1898. Cancellation of policy.

1899. Rescission—Necessary party to suit for.

1900. Defense of false representation as to value of property—Burden of proof.

1901. Defense when fraudulent concealments or representations were made.

1902. False representations as to other insurance.

1903. Same continued—Return of premium.

1904. Fraudulent proofs of loss.

1905. Fire insurance—Ownership of property.

1906. Fire Insurance—Defense as to provision requiring production of books for examination.

1907. Defense that large quantities of oil and petroleum were stored, and drawn at night in violation of policy.

SEC.

1908. Defense that fire was caused by willful act or procurement.

1909. Insurance on steamboat—Negligence of owner's agent—Seaworthiness of boat.

1910. Accident insurance—Proof of claim.

1911. Accident insurance—What necessary to recovery for death upon.

SEC.

1912. Consideration—Adequacy or sufficiency not inquired into.

1913. Insurance — Application — Statements how treated.

1914. Insurance — Life — Misrepresentation by insured.

1915. Same continued—What constitutes waiver of misrepresentations.

1916. Concealment of material fact concerning insurance, or subject thereof.

**Sec. 1885. Burden on plaintiff to prove loss—Proofs of loss—
Or waiver of provisions by defendant.**

The burden is upon the plaintiff, in order to entitle her to recover here, first, to establish by a preponderance of the evidence that this property destroyed by fire was not excepted by any of the provisions of this policy of insurance upon which she predicates her action, and to establish the amount of her loss by reason thereof, and that within the time provided by the policy she furnished to the company or its authorized agent proofs of loss, as required by the policy, or that that provision of the policy was waived by the company or its authorized agent, or by either; or by the act of its authorized agent she was prevented from thus complying with the conditions of the policy. These are the propositions that the plaintiff must maintain to entitle her to recover, and she must maintain these propositions by a preponderance of all the testimony in the case.

Look into the testimony and conditions of this policy and ascertain whether or not the loss and damage by fire was one that was not excepted by this policy; if not, then your next inquiry will be, did she, at the time required by this policy, furnish to this company, or its authorized agent, proofs of loss such as are required by that condition of the policy; if she did not, was that provision of the policy required on her part to be complied with waived by the company or any of its authorized

agents? If not, was she by the act of the company, or its authorized agents, prevented from complying with it and furnishing to the company within the specified time such proofs of loss?

Sec. 1886. Waiver of proofs of loss—Burden of proving authority of agent on plaintiff—Instructions as to waiver of conditions—By agent.

It is admitted in the pleadings and admitted in the trial that the proofs of loss were not furnished within the time specified in the policy. The plaintiff seeks to avoid the effect of failing to comply with this condition of the policy by showing that it was waived by the company, or by its agent, or that the defendant company, or its agent, prevented her by their conduct from thus furnishing proofs of loss. Now, I say to you, gentlemen, that that provision of the policy can be waived after a fire—after a loss—by the company by its president, or officer, or any agent authorized to act for and represent it, no matter what he may be designated, whether adjuster, or solicitor, or what not, it depends upon his power to represent the company in the insurance business whether or not he has authority to waive that provision of the policy. And if the agent has general authority to make contracts of insurance, to fill out and issue policies, to collect premiums, and to represent the company in its business of prosecuting the insurance business, he has power to represent it in all matters incident thereto. And if you should find from the testimony that the agent, S., had authority to represent the company here in the transaction of its business as an insurance company, the procuring of insurance, the filling out and issuing of policies, making contracts of insurance, and the collection and handling of its moneys, he had power to represent the company in waiving the provisions of the contract thus made by him. The burden of establishing this authority of this agent is upon the plaintiff, and if you should find he was thus authorized, then you will look into the testimony and determine whether or not he did waive the performance of this provision of this contract within the fifteen days. If he did not do it

by express terms, did he by his act and conduct lead the plaintiff to understand, by what he said and what he did, that a strict compliance with that provision of this policy was waived and would not be insisted upon? Or did the adjuster, having authority to adjust and settle these losses, lead her by his conduct and declarations to understand that a strict performance of that provision of the policy would not be required?¹

¹ From *United Fireman's Ins. Co. v. Kukral*, Supreme Court, unreported, No. 1699 (13-161). Judgment of circuit court affirmed, 31 W. L. B. 233.

Waiver.—There is a waiver if the company notify the insured that they will pay in any event, 2 C. S. C. R. 186. Investigation without waiting for proofs is a waiver, 2 Am. L. Rec. 336. Waiver may be after as well as before the time stipulated for presenting proofs, 7 C. C. 356. If an agent tells the assured, after an examination of the loss, that "nothing further is required," it is a waiver of the preliminary proofs of loss, even though there is a clause providing that no agent has power to waive any condition. *Bish v. Hawkeye Ins. Co.*, 69 Ia. 184. If an agent authorized to settle a loss induces the assured to forbear bringing suit, the company waives the limitation. *Stevens v. Citizen's Ins. Co.*, 69 Ia. 658. The requirements of a policy that proofs of loss shall be given as soon as possible, may be waived by the insurer's conduct and negotiations. *Dohn v. Farmer's Joint Stock Ins. Co.*, 6 Lansing, 275. Evidence that the person who solicited insurance used language to the insured which might have induced him to postpone making and forwarding the proofs within the time limited, was evidence to sustain a waiver of the condition. *Norton v. Renssalaer Ins. Co.*, 7 Cow. 645. The adjuster may waive proofs. *Aetna Ins. Co. v. Shyer, et al.*, 85 Ind. 362. The adjuster may waive and if he places the refusal to pay loss wholly upon other grounds, it is a waiver of the right to defend a suit on the ground that such proofs were not made. *Eggleston v. The Council Bluff Ins. Co.*, 65 Ia. 308. The company may waive proofs, and proofs may then be made in the prescribed time after the waiver, where it is shown that the insured, without any fault or fraud on his part, is unable to procure certain of the proofs of loss required by the policy of insurance, he may recover without a literal compliance with the proofs of the policy in this respect, for the law will not require an impossible thing. As to waiver by act of agent in furnishing blanks for proofs, see 88 Pa. St. 230, 13 Phila. 551. The fire insurance company received and retained proofs of loss without objection, and they were twice asked in writing to inform the insured if it wished for any further statement made; no reply. Held, that the insurance company waived the defense. *Grange*

Mill Co. v. Western Ins. Co., 118 Ill. 396; Continental Life Ins. Co. v. Rogers, 119 Ill. 479. Proofs of loss, or objection to the form of proof, is waived when the company bases its refusal to pay on other grounds. Hartford Protection Ins. Co. v. Marmer, 2 O. S. 452. Objections to the preliminary proofs will be considered as waived, if, after they are rendered, no specific objections are pointed out, and the assured is informed that his claim will be considered on the merits, and a claim is rejected, finally, upon the grounds that the company is not, in any event, liable to pay the loss. The Globe Ins. Co. v. Boyle, *et al.*, 21 O. S. 130.

**Sec. 1887. Conditions as to time of proof of loss—And proof
—When right to sue accrues—What is a
sufficient notice—Notice and proof of loss—
Waiver of—How made.**

After reciting the substance of the conditions, proceed:

These conditions are binding upon the plaintiff, and it can not recover unless it has shown that it performed them, or has shown waiver of such performance on their part by the defendant. The notice and proof of loss must be furnished or waived, too, for sixty days, before the insured is entitled to payment or has a right to bring a suit for the same. If the insured brings suit within the sixty days, he must fail, except in the event of the company denying all liability on the policy. In the latter event an action may be commenced without waiting the time limited—sixty days.¹

Waiver of proof of loss does not make the claim due at once; the company would still be entitled to the sixty days after the waiver to investigate, and for such other purposes as it might want the time for, except as stated—it notifies the insured that it will not pay in any event. In the latter event, the condition that no action be brought within sixty days after proofs of loss is deemed waived. So also a denial of all liability, made after inquiring into the loss, on the ground that the loss is not within the policy, or that the policy is void is a waiver of the clause requiring proofs of loss.

A notice of the loss given immediately after the fire, or as soon thereafter as it can be done with reasonable diligence, to

the agent of the company at the place where the fire occurred, or with such diligence causing notice of the loss to be brought to the knowledge of the company, is a sufficient compliance with the condition requiring notice of the loss to be given to the company.¹

¹ Bliss, Life Ins., sec. 355-8; Wool, Ins., page 728.

Sec. 1888. Waiver of proofs may be inferred from acts of company—Mere silence, nor sending agents to investigate, nor attempt to compromise will not amount to waiver—What other acts in connection therewith will.

“The requirement of preliminary proofs of loss is a formal condition inserted in the policy solely for the benefit of the insurer. That such proofs may be waived, in whole or in part, is well settled as a legal proposition. The waiver may be by the direct action of the insurer, or by his general agent by virtue of his authority. The waiver may be express, or it may be inferred from the denial of obligation by the insurer exclusively for other reasons.”¹

A waiver may be inferred from the acts and declarations of the company, or of its authorized agents acting within the scope of their employment. The adjuster, employed by the defendant to act for it in the matter, was the agent of the company, and all he did in the matter within the scope and line of his employment and duties as such adjuster were the acts of the company and binding upon it.

Mere silence on the part of the company will not amount to a waiver of proof of loss; nor would the sending of agents to make inquiry or investigation into the matter of the loss; nor would even an attempt to compromise the matter, either or all of them, in themselves amount to a waiver of proofs of loss, provided nothing was done while so engaged that would cause a man of ordinary judgment and discretion to believe that formal proofs of loss were waived. But if such agent or agents, while so engaged, act in the matter so as to cause the

insured to believe that proofs of loss are waived, and their acts are such as would have caused a man of ordinary discretion and judgment to so believe, and the insured, by reason thereof, refrain from making such proof, such acts will amount to a waiver of such proof. If the company, by its adjuster or agent, proceeds to investigate the matter of the loss on its merits, and by what it does causes the insured to believe, and a man of ordinary judgment under the circumstances would have so believed, that it is only the amount of the loss that is in dispute, and nothing else, between the parties, that will amount to a waiver of proofs of loss. So, as said, an absolute refusal to pay on the merits of the claim or a denial of liability to pay in any event will amount to a waiver. The company must not by its acts, or by the acts of its agents acting within the line of their duties and authority as such agents, do anything that will throw the insured off his guard and cause him to believe that proofs of loss are not wanted by the company. If such acts are such as would cause a man of ordinary judgment and discretion to so believe in like circumstances, and the insured so believed and acted on such belief, the company will be held to have waived such proofs.

And if the company waived such proofs, it can not afterwards recall or reclaim such waiver, and demand or insist upon such proofs. If once waived, the company can not afterwards insist upon the performance of the condition requiring such proof.

From the fact, if a fact, that the company sent an agent to the place of the loss to make investigation in regard to the same, and from what the evidence may show, if anything, he did about making such investigation; from the fact, if a fact, that the company sent an adjuster to adjust such loss, and from all such adjuster did in regard to the matter; from the fact that the plaintiff and defendants, on ———, pursuant to the condition in the policy—set out in printed matter in the third defense as amended—selected two persons to ap-

praise and estimate at the true cash value the damage by fire to such of said property covered by the policy as might be found in a damaged condition, as alleged in said defense; the fact of such appraisement being made and reported by such appraisers; the fact, if a fact, that D. and such adjuster agreed upon the loss upon other of the property covered by the policy; from what the evidence shows was done and passed between said adjuster and D. while about the matter of attempting to adjust such loss, altogether, from all these and from all circumstances disclosed by the evidence, you will determine whether or not the company waived proof of loss, the burden of proving such waiver by a preponderance of the evidence being upon the plaintiff. If so waived sixty days before suit brought, the plaintiff is entitled to a verdict if it has otherwise made out its case. If such waiver was made within sixty days before the suit was brought, the plaintiff can not recover, unless the plaintiff proves that there was an absolute refusal by the company to pay in any event.²

¹ Ins. Co. v. Parisot, 35 O. S. 40, 41.

² Wm. E. Evans, J., in *Germania Fire Insurance Co. v. Dunn & Co.*, supreme court, judgments affirmed, charge approved.

Sec. 1889. Proof of loss—If policy of insurance destroyed it is duty of company to furnish copy or information—Failure on its part may estop company from claiming proofs not in time.

If you find from the testimony that the policy of insurance was destroyed by fire, and she did not have it in her power to furnish a written description, or copy of the written portion of the policy, and did not have within herself the specific directions that the policy required to be complied with in that respect, and she applied to the agent of this company for the information, or for a copy of the policy thus to enable her to fulfill that condition of the policy, it was the duty of that agent, and the duty of the company, to furnish her with that information thus possessed by them and not possessed by her, and the refusal on their part to furnish her with that information, if a

compliance on their part at the time she asked for it would have enabled her to furnish proof of loss within the time required by the policy, and she was not, by reason of that refusal, able to furnish proofs of loss thus required, that would be an act upon their part which would prevent her from furnishing her proofs of loss, and would estop them from setting up that defense. The rule in regard to estoppel is in substance as alleged here, and the rule in regard to waiver is simply honesty and fair dealing between the parties; what has the plaintiff a right to believe and fairly consider under all the circumstances of what was said and what was done—what had she a right to fairly believe and act upon under these circumstances?¹

¹ From United Fireman's Ins. Co. v. Kukral, supreme court, unreported, No. 1699 (13-161), judgment of circuit court affirmed, 31 W. L. B. 233.

Sec. 1890. Burden of proof in action for loss by fire—Proofs of loss, etc.

The burden of proof of the material allegations of the plaintiff's petition that are denied by the answer is upon the plaintiff; that is to say, it being admitted, as I have told you, that the policy was issued, the date, the amount of insurance, the property covered, the occurrence of the fire, and that in payment of the loss or damage there made, it then devolves upon the plaintiff to establish by a preponderance of the evidence that notice of such fire was given by the insured immediately after the occurrence, and that, as soon thereafter as possible for the plaintiff to do so, the plaintiff made out and furnished to the defendants proofs of loss as required by the policy you have in force.

The fact, if such you find to be the fact, that the proofs of loss were made by the plaintiff to defendant company, as provided by the terms of the policy, does not relieve the plaintiff in the action from the burden of proof by a preponderance of the evidence of the *amount* of the loss or damage sustained by the fire to the property insured. The proofs of loss, if you

find that any were made, are simply evidence for the insured of compliance with the conditions of the policy requiring them, but not of the facts contained in the proofs of loss. Therefore it devolves upon the plaintiff to prove by a preponderance of the evidence the amount of loss or damage by reason of the fire to the said property insured, and which loss or damage the policy provides shall be based upon the actual cash value of the property at the time of such fire. If the plaintiff has by a preponderance of the evidence proven these facts, then the plaintiff will be entitled to recover in such sum as the jury shall find from the evidence to be the amount of such loss or damage caused by the fire, unless the jury find by a preponderance of the evidence the existence of certain other facts, or any of them, as claimed and alleged by the defendant in his answer, and of which testimony has been offered tending to prove.¹

¹ Melhorn, J., in *Carnahan v. Penn. Fire Insurance Co.*, Hancock County Common Pleas.

Sec. 1891. Insurance of partnership property—Was partnership dissolved at time insurance issued—Representation as to ownership of property.

In order to recover in this action the plaintiff must prove by a preponderance of the evidence that said D. & Co. was a partnership doing business in Ohio as alleged; and that, at the time the policy of insurance was issued and at the time the property described therein was injured or destroyed by fire, such property was owned by said partnership; that said property was injured or destroyed by fire as claimed, and the amount of such injury or loss; and that the plaintiff performed all the conditions of said policy on its part, or that the defendant waived such of the conditions as were not performed by it sixty days before bringing this action; that such of said conditions as by the terms of the policy were required to be performed sixty days before suit brought were performed, or the performance thereof was waived by the defendant sixty days before the suit was brought.

The policy of insurance is the contract between the parties. The indorsement upon or attached to it, specifying how much of said \$5,000, the amount named, is upon specified classes of said property, is a part of the policy. Both parties are bound by and have a right to insist upon the performance of all the terms and conditions of the contract of insurance—the plaintiff as much as the defendant, and the defendant as much as the plaintiff, and either as much as an individual might do under like circumstances.

(a) *The plaintiff must have been, as alleged, a partnership doing business in Ohio, and the owner of the said property.* If, at the time the policy of insurance was issued the firm or partnership of D. & Co. had been dissolved and was not in existence, then the representation that the property was the property of D. & Co. would avoid the policy, and the plaintiff can not recover; * * * If it had not been dissolved before the policy was issued, or before the fire, if it was an existing partnership, and the owner of the goods, it can recover, if it has in other respects made out its case under the instructions. If D. & Co. was a partnership for the purpose only of carrying on a banking business, the fact, if a fact, that D. purchased the goods for the firm of D. & Co. in consideration for and in satisfaction of a judgment in favor of D. & Co. against the then owner thereof, without consulting C. or getting his consent thereto, did it in good faith, thinking it for the best interest of D. & Co. to do so; and the further fact, if a fact, that he, thinking it for the best interest of D. & Co. to do so, kept the store, of which the goods in question constituted the stock, open as a going concern and sold goods therefrom for a time, will constitute no defense for the defendant in this action.¹

¹ Wm. E. Evans, J., in *Germania Fire Insurance Co. v. Dun & Co.*, supreme court, judgments affirmed, Fayette county.

Sec. 1892. Vacancy of property—Breach of condition as to.

There is a provision connected with the clause which reads: "Shall become vacant and unoccupied without the written

assent of the company indorsed thereon." The defendant says that this property became vacant and unoccupied, and that it was destroyed by fire while in that condition, and that that condition was not with the assent of the company written or indorsed upon the policy. In order to forfeit this policy under this clause, it is necessary that the premises in question should be both vacant and unoccupied. There seems to be a distinction drawn between occupancy and vacancy of premises,¹ but the language of this policy is such, being connected with the conjunction, and, that both occupancy and vacancy must exist, or a want of occupancy and a vacancy of the premises must exist in order to enable the defendant to avail itself of this provision of the contract. If no person is living in the building—in the premises—sleeping there, lodging there, occupying it in the usual way of a dwelling-house being occupied by persons, then it is unoccupied within the meaning of this clause of the policy.

1. *What constitutes occupancy.* And the having of a few articles of furniture, whether it be carpets or anything else in the house, is not such an occupancy or use of the premises as would render it not a vacant house or unoccupied dwelling-house. Therefore, if you find under the proof in this case that at the time this policy was issued it was occupied by a tenant of M. R., and that subsequently that tenant moved away from the premises, and after the tenant was gone, M. R., with a view to a future occupancy of the premises by herself, commenced making preparations for such occupancy by placing in the building a carpet or two carpets, and a chair or two, that would not relieve the plaintiff or M. R. from the force and effect of this provision of the contract, providing the fire which destroyed or injured the premises occurred before anyone actually moved into the premises, or so placed therein furniture and goods that it could not be said to be vacant.² The mere intention of a party to move into premises is not an occupancy in fact of those premises. The intention to move the necessary articles for housekeeping into the premises does not constitute such an occupancy of the building by furniture and goods as to relieve it from the charge of being vacant. If you find that there

was in the building at the time of the fire substantial articles and furniture for housekeeping by a family or by one or two persons, the place would not be vacant within the meaning of this provision of the policy. But if only a portion, simply an article like a carpet or two carpets, or a chair or so was in there, if that is all or substantially all there was of it, the plans simply consisting of an intention to put other articles therein in the future and to go there and occupy the building, that would not be such an occupancy of the premises as to relieve the plaintiff from the obligations of this provision of the contract, nor would it deprive, in other words, the defendant from availing itself of this provision of the contract in case any fire occurred while the premises were in this situation and condition.³

¹ *Moody v. Insurance Company*, 52 O. S. 12.

² Cf. *State v. Tuttgertding*, 5 W. L. B. 464. A tenant's removal permanently renders premises vacant, 42 O. S. 519. Leaving furniture all in house ready for use is not leaving it vacant, 52 O. S. 12.

³ From *Hanover Fire Insurance Company v. Citizens' Savings & Loan Association*. Supreme court, unreported, No. 1562. Judgments of circuit court and common pleas affirmed, 27 W. L. B. 216. Charge approved.

Sec. 1893. When is a building vacant or unoccupied.

What constitutes vacancy or non-occupancy of a building is a question of law; but whether a building is vacant or unoccupied or not, within the meaning of the law, is a question of fact for the jury.¹

To constitute occupancy of a dwelling-house, it is not essential that it be continuously used by a family. The family may be absent from it for health, pleasure, business or convenience for reasonable periods, and the house will not, on that account, be considered as vacant or unoccupied. Under a policy which declares that no liability shall exist under it for loss or damage to an unoccupied building, but does not stipulate that the insured building shall be used as a dwelling, or require any particular mode of occupancy. Strictly construed, occupancy for any lawful purpose would satisfy the condition and preserve the obligation of the policy. It is not in any event essential that the

building be put to all the uses ordinarily made of a dwelling, or to some of those uses all the time; nor that the whole house should be subjected to that use. Nor is a dwelling-house considered as unoccupied merely because it has ceased to be used as a family residence where the household goods remain ready for use and it continues to be occupied by one or more members of the family, who have access to the whole building for the purpose of caring for it, and who do care for it and make some use of it as a place of abode.²

¹ *Moody v. Insurance Company*, 52 O. S. 12.

² *Moody v. Insurance Company*, 52 O. S. 12; *Insurance Company v. Kiernan*, 83 Ky. 468; *Richards on Insurance*, sec. 56; *May on Insurance*, sec. 247.

Sec. 1894. Vacancy—Waiver of forfeiture by reason of vacancy of premises—Burden of proof.

If you find, gentlemen of the jury, that these premises were in fact vacant and unoccupied, and Mrs. R., or anyone representing her, gave notice to the duly authorized agent of the defendant of that fact, and you find that the agent upon receiving that notice said "all right," or words to that effect, "that he would be over and see her," that would constitute a waiver of this provision of the policy forfeiting the same by reason of a vacancy and unoccupancy of the premises; in other words, it was within the power of the company to waive this provision of the policy—of its contract, and this waiver could be made by an agent of the company—could waive the enforcement of that provision of the policy, could waive its endorsement thereon, or the assent of the company endorsed thereon, and if you find from the testimony that such was the case before this fire and after this policy was issued and before the fire occurred, that notice was given in this way to the agent and he made the reply "all right," that he would be over and see about it, and the fire occurred after the notice was given and before he came to see about it, it would be a waiver of that provision of the policy and would not interfere with the right of the plaintiff to recover in this action.

On the question of the preponderance of the evidence I will say to you that the burden does rest upon the plaintiff to show the waiver. If you find that this property was vacant and unoccupied, and the fire occurred during that vacancy and unoccupancy of the building, if it is claimed a waiver of that provision was made, the burden of proof to show that waiver rests upon the plaintiff; and I will also say in this connection the burden of proof rests upon the defendant to show, and it must satisfy you by a preponderance of the evidence that this building was vacant and unoccupied at the time of the fire.¹

¹ From *Hanover Fire Ins. Co. v. Citizens Savings & Loan Association*, supreme court, unreported, No. 1552 (12-741); judgment of circuit court and common pleas affirmed, 27 W. L. B. 216, charge approved.

Sec. 1895. Total or partial loss.

It is a question of fact for you to find from the evidence whether this was a total loss by the owner of this property, or whether it was only partial. If you find from the evidence that it was a total loss, and further find such a state of facts as prevented the defendant from availing himself of this clause of the forfeiture to which I have called your attention, or, in other words, find that it was not vacant and unoccupied when the fire took place—I say if the premises were not vacant and unoccupied, and the loss was a total loss, and no fraud was perpetrated in procuring this insurance, and no act had been done to increase the risk after the policy was issued, this plaintiff would have the right to recover the full amount named in this policy, \$——. If, however, you find that it was a partial loss only, then the plaintiff would be entitled to recover only the full value of the loss actually sustained to the building, whatever the proof may show you that loss to have been. To make this more clear, I will repeat it. If you find that the building was totally destroyed, or rather a total loss by reason of this fire, and that the policy was procured without fraud, and nothing had been done with the premises after the issuing of the policy to increase the risk, and the premises were not vacant and

unoccupied at the time of the loss, the plaintiff would be entitled to recover the full amount of the policy, which is claimed to be \$——. But if you find that the loss was a partial loss and not a total loss, then the recovery would be simply the actual damage done to the property by the fire.¹

¹ From *Hanover Fire Ins. Co. v. Citizens Savings & Loan Association*, supreme court, unreported, No. 1552; judgments of circuit court and common pleas affirmed, 27 W. L. B. 216, charge approved.

Sec. 1896. Compromise of loss obtained under duress.

The court now says to you, as a matter of law, that if you find there was a contract of compromise, and if the only consideration that entered into that contract of compromise was simply the settlement and adjustment of the claim in dispute between them, then that, in this case, under this evidence, this plaintiff can not recover, provided you find there was such a contract of compromise. But the court further says to you that if you find there was such a contract of compromise made, and if any part of that contract or compromise was an agreement not to prosecute this plaintiff upon the charge of burning her own property, then I say to you such a contract of compromise was void and is of no force and effect as a defense in this case. But, as I said before, if it was no part of the consideration of the contract or compromise that they agreed not to prosecute her for the charged crime of arson, then I say to you the plaintiff can not recover under the evidence and law as applied in this case.

Sec. 1897. Evidence as to value of property as reflecting on charge of destroying property.

Evidence has been offered in this case touching upon the value of the property insured, and it is maintained by the defendant that the evidence shows that all the property, including the land upon which the buildings were situated, were not of the value for which this property was insured; on the other hand the plaintiff maintains that the property was of greater value. This

evidence was offered and bears upon the motives of the plaintiff, whether or not it would be to his interest to have this property destroyed and thus reap a benefit by the insurance, and therefore it is admitted for the purpose of showing what, if any, motives the plaintiff could have had for destroying this property: would it be to the interest of this plaintiff so to do.¹

¹Gillmer, J., in *Hickox v. Ins. Co.*, Trumbull County Common Pleas.

Sec. 1898. Cancellation of policy.

You are instructed that it was competent for the plaintiff and the defendant by its agent to surrender and cancel said policy or contract of insurance at any time between the date of the said policy and the date of the said loss or fire. And if you find from the evidence that the plaintiff and the defendant by its agent did agree to surrender and cancel said contract of insurance at any time between the issuance of the policy and the date of the fire, then the defendant would not be liable for any loss accruing after the surrender or cancellation of said contract policy of insurance. And before you can find that such policy or contract of insurance was surrendered by the plaintiff to the defendant by the mutual consent of the parties, you must find that the minds of the parties met, and that the plaintiff and defendant undertook to and did make an agreement to surrender the policy with the understanding that the same was to be canceled and of no binding force or effect thereafter.

In determining whether there was a cancellation by the mutual consent of the parties, you should look into and determine from the evidence whether it was the intention and understanding of the parties at the time the policy was delivered by the plaintiff to the agent of the company that the same was to be canceled and surrendered and of no force and effect. Look into and determine what was said and done between them, their conduct in relation thereto, and from it determine whether there was at that time an intention on the part of the plaintiff and the defendant that the contract was then surrendered and canceled and of no further binding force.

The defendant had a right by the terms of the policy of giving the plaintiff five days' notice of its intention so to do before canceling said policy without the consent of the parties; and if you find the defendant did cancel the policy after giving the plaintiff five days' notice of its intention so to do, then such policy would not be in force and the plaintiff would not be entitled to recover herein. But before the defendant could cancel the policy under the provisions thereof it must give the plaintiff five days' notice of its intention so to do, and must have returned to the plaintiff the unearned premium thereon, unless there was some waiver of the notice so required and of the return of said unearned premium.

The plaintiff had the right to waive the five days' notice, but whether he did so is a question of fact for you to determine.

* * * It is not necessary to put a written cancellation upon the policy in order to complete its cancellation. The cancellation of the policy might be made without placing any writing thereon.¹

¹ Nye, J., in *Leonard v. Queen Ins. Co.*

Sec. 1899. Rescission—Necessary party to suit for.

“If each policy was respectively made out on the application of a person other than plaintiff, and was made payable to such person, then such person is a necessary party to the surrender, release, or rescission of the policy issued to him or her, and if it be further found that the policy was not surrendered, released, or rescinded by such party, but continued in force and binding on the company, then the plaintiff can not recover.”¹

¹ From *Insurance Co. v. Rodgers*, 33 O. S. 533.

Sec. 1900. Defense of false representations as to value of property—Burden of proof.

It may be a difficult matter to formulate a charge that will answer in all cases where there are false representations made to procure insurance, but the following is a case of frequent

occurrence and is therefore given as found in the judge's charge from which it is taken.

“As a ground of defense it is alleged by the defendant that the plaintiff, in order to obtain the insurance from the defendant company and other companies, to induce the defendant company to issue the policy sued on, and to take the risk equal to — part of the item described in the policy, falsely and fraudulently represented to the defendant that the plaintiff kept in his store building an average stock of merchandise to the value of \$——, and kept and carried store furniture and fixtures to the cash value of \$——, and the cash value of the property in the store building was more than \$——. The defendant avers that these representations were false, that the plaintiff at the time they were made knew them to be false, and that they were made for the purpose of procuring an excessive insurance, and for the purpose of defrauding the insurance companies, including the defendant company. The defendant says that the real value of the property at the time the policy was issued and at all times thereafter did not exceed \$——, which the plaintiff well knew, and the defendant did not know, but that the defendant, relying upon the representations and believing them to be true, was thereby induced to issue the policy which he otherwise would not have done. * * * To establish this defense claimed by the defendant the burden of proof is upon the defendant. It must show by a preponderance of the evidence that the plaintiff did make these representations alleged; that they were false, and that the plaintiff at the time they were made knew them to be false, that the defendant did not know that they were false, and that they were made to induce the defendant to issue the policy, and, if the defendant did so satisfy you, the plaintiff can not recover and your verdict should be for the defendant. But if you find that the plaintiff did not make such representations, or, if made, that they were true and not false or fraudulent, then this defense fails. If you find from the evidence that the defendant concurred with his co-insurers on the property insured and fixed the value of the insurance as claimed by the

plaintiff, the defendant can not, under these circumstances and in the absence of any fraud on the plaintiff's part, complain of the value so fixed on the said property in so far as claiming fraud on the plaintiff's part in this respect.¹

¹ Melhorn, J., in *Carnahan v. Penn. Fire Ins. Co.*, Hancock County Common Pleas. As to overvaluation, see 6 O. C. C. 1.

Sec. 1901. Defense when fraudulent concealments or misrepresentations were made.

The facts in the case from which the following instructions are taken appear in many such actions about as follows:

“That the policy provided that if the party insured concealed or misrepresented, either in writing or otherwise, any material fact or circumstances concerning the insurance, or in case of any fraud or false swearing by the insured, touching any matter relating to the insurance, whether before or after the loss, it should be void, and also that as soon as possible after the fire the party insured should render a particular account, proved, signed, and sworn to by the insured, stating his knowledge and belief as to the origin of the fire, also the full value of the property covered by the policy at the time and immediately preceding the loss, and the amount of loss or damage sustained. It was charged in this case that a false statement was made by the plaintiff, and that the plaintiff falsely swore to the statement, and that the provisions of the policy were therefore violated.

“You are instructed that in order to constitute a valid defense under the condition of the policy, and in relation to the concealment and misrepresentations, or fraud, or false swearing by the insured, it must appear from the evidence that it was in relation to some material fact or circumstances concerning the insurance, and that it was done by the plaintiff firm, or by its members, or either of them, willfully or knowingly, and that it was the intention to deceive and defraud the officers and agents of the defendant company. If you find from a preponderance of the evidence that the plaintiff firm by its members, or either of them, by concealing or misrepresenting or falsely swearing

touching any material fact or circumstances concerning this insurance, as claimed by the defendant, this in law would be such fraud upon the defendant as would render the policy void.

Fraud and false swearing, in order to prevent recovery, must be intentional with the parties defrauding, and it may be with reference to any material matter concerning the insurance, it may be by overvaluing the loss, or by undervaluing what they have, or it may be swearing to a loss of property which was not in existence, and in many other ways. If the insured, with reference to the quantity and value of the goods insured, made a claim which he knew to be false, and to defraud the defendant, he can not recover anything. If you find then from the preponderance of the evidence that the allegations contained in this defense are true, then the plaintiff can not recover and your verdict should be for the defendant.”¹

¹ Melhorn, J., in *Carnahan v. Penn. Fire Ins. Co.*, Hancock County Common Pleas.

Doctrine of concealment applies to fire insurance. The insured must not misrepresent or designedly conceal, unless the fact is of unusual peril, and not discoverable by the insurer. *Ins. Co. v. Harmer*, 2 O. S. 452; *Ins. Co. v. Ins. Co.*, 5 O. S. 450. The materiality of the fact concealed is for the jury, 2 O. S. 452.

Sec. 1902. False representations as to other insurance.

The false representations material to the risk that would avoid the policy must be to some existing fact affecting the property insured at the time the risk was taken, or during the existence of the policy. And we say to you that any substantial representation as to the fact whether the property to be insured was or was not insured, and was or was not covered by other valid subsisting insurance, would be material to the risk, and any substantial misrepresentations in these respects, intentionally or fraudulently made by the plaintiff to the agent to induce him to issue a policy, and if the policy was issued by reason of such misrepresentations, the defendant, relying thereon and not knowing them to be false, would avoid the policy.

When verbal representations are made material to the risk, it is not sufficient that they be false to avoid the policy; it must

appear that they are both false and fraudulent to have that effect. If they were honestly made, though they may be untrue in fact, the policy is not thereby rendered void. But material representations made by plaintiff to the agent issuing the policy, which she assumed to be within her personal knowledge, or which she made recklessly, not knowing them to be true, are false and fraudulent in the legal sense, if made with an intent to deceive the insurer, if they were untrue in fact, and were relied upon by the insurer in absence of knowledge to the contrary upon his part in taking the risk, although the plaintiff did not know them to be false.

If nothing was said before the making and delivery of policy by either party as to encumbrances or rather insurance on the property insured, the company will be presumed to have waived these conditions of the policy, if the insured acted in good faith.¹

(a) *Good faith of plaintiff.*

As bearing upon good faith of plaintiff the value of the property insured has been permitted to remain before you, but unless you find from a preponderance of the evidence that the plaintiff was guilty of intentional fraud in respect to the matter wherewith she is charged with fraud in the defendant's answer, it can not be used by you to reduce the amount of recovery below the amount for which the dwelling-house was insured, if you find the plaintiff entitled to recover.

If you should find from a preponderance of the evidence that the plaintiff was so guilty of intentional fraud as herein defined and set up in the answer to the charge of insurance or mortgage incumbrance, then she can not recover for any loss to her house.

If you should find against the plaintiff upon the insurance upon the dwelling-house, if you should find that the risk was taken at the solicitation of the agent and not of the plaintiff, and that she made no intentional fraudulent misrepresentations respecting the household furniture and other personal property covered by the policy, you may find for her for the value of such personal property, not exceeding \$——, as you find

from the evidence was covered by the policy and was destroyed by the fire, with interest thereon from ——. ²

¹ A clause prorating recovery in case of other insurance is not an assent to obtaining other insurance, 28 O. S. 69. Such condition is waived if the interrogatory in the application is left unanswered, 24 O. S. 345.

² Voris, J., *France v. Norwich Union Fire Ins. Co.*, Summit County Common Pleas.

Sec. 1903. Same, continued—Return of premium.

If you find that the plaintiff was guilty of intentional fraud as herein limited and defined (*ante*, sec. 1902), the defendant need not offer to return the premium paid on this policy for interest on its invalidity because of the fraud set up in its answer. ¹

¹ Voris, J., in *France v. Norwich Union Fire Association*, Summit County Common Pleas.

Sec. 1904. Fraudulent proofs of loss.

“The jury are instructed that if they believe from the evidence that the policy sued on contained a provision that all fraud, or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims under the policy, and that, if they further believe from the evidence that plaintiffs have fraudulently offered to defendant proofs of loss under the policy, containing material statements in regard to the loss under said policy, which the plaintiffs knew to be false at the time the same were offered, you will find for the defendant.” ¹

¹ From *Shulter v. Ins. Co.*, 62 Mo. 237.

Sec. 1905. Fire insurance—Ownership of property, insurable interest.

The defendant claims that the policy of insurance issued upon in this case was void and never took effect because the plaintiff at the time the policy was issued was not the owner of the property insured. You are instructed therefore that if the owner had no insurable interest in the property, no interest therein at the time the policy was issued, the policy would be void. But if you find from the evidence that he had an insurable

interest in the property, the policy would not be void, unless you further find that the plaintiff, at the time he procured said policy, falsely and fraudulently represented his interest therein to the agent of the company. And if you find from the evidence that at the time the policy was issued the plaintiff had the legal title to the property and was in possession thereof, the mere fact that a man of some other name claimed an interest therein would not of itself vitiate the policy.

If you find that the plaintiff at the date of the policy was the absolute owner of the property, then he would have an insurable interest therein. And if the plaintiff at the date of the policy had a legal title to the property and was the owner thereof, but that he was under obligations to account to some other persons for a portion of the proceeds thereof, he would still have an insurable interest therein.

But unless you find from the evidence that he falsely represented to the agent of the defendant company at the time of the issuing of said policy the true nature of his title and interest therein, said policy would not be void.¹

¹ Nye, J., in *Leonard v. Queen Ins. Co.*

Sec. 1906. Fire insurance—Defense as to provision requiring production of books for examination.

The following instructions may cover the usual provisions in policies touching the matter of the production of books for the examination.

The burden of proof upon this issue is upon the defendant, and unless the jury finds by a preponderance of the evidence that what is alleged as to the production of books and vouchers in this matter on the part of the insured, as required by the policy, is true, this defense is not maintained. It was the duty of the plaintiff to comply with this provision of the policy and produce for examination its books, accounts, invoices, which it then had, upon the request of the defendant. But only such books and other vouchers as were reasonably in the power of the insured to furnish need be furnished. If you find from the evidence that the plaintiff did this. and he was ready and willing

so ~~to~~ do, it would be a compliance on his part with this provision of the policy.

If, however, you should find that the plaintiff, having books of account and other vouchers, refused to furnish them or permit their inspection at a reasonable time and place, or if you find that books of account, bills, and other vouchers, or any of them, were by the plaintiff fraudulently kept from the defendant for the purpose of rendering it impossible for the defendant to determine the amount of stock and loss, then the plaintiff can not recover.¹

¹ Melhorn. J., in *Carnahan v. Fire Ins. Co.*, Hancock County Common Pleas.

Sec. 1907. Defense—That large quantities of oil and petroleum were stored, and drawn at night in violation of policy.

The burden of proof to establish this defense is upon the defendant, and if you find by a preponderance of the evidence that the plaintiff, shortly before the fire, caused to be carried into the building in which the insured property was kept a large quantity of coal-oil or petroleum, which was not used, and which was not intended to be used for lighting the store, or for sale therein, and was not kept for either purpose, as provided in the policy, and that the oil was drawn from the barrel in which it was kept and stored in the night time and not by daylight, by the direction or with the knowledge of the plaintiff, this would invalidate the policy, unless the storing of such oil as it appears from the evidence was brought to the defendant's knowledge, and the companies consented to such storing of oil in the building. If the jury find from the evidence that coal-oil or petroleum was brought into the store by the plaintiff, or by one of its members, for the purpose of defrauding the defendant, and for the purpose of increasing any loss or damage that might accrue to said property by fire, and that by act or procurement of the plaintiff firm, or one of its members, the oil was put upon the floor of the building containing the insured property, or upon the goods, or both, and that by igniting or burning, caused

a large part of the damage or loss which accrued from the fire, if you find such to be the fact, the plaintiff can not recover. It must affirmatively appear that, if any such act as this was done, it was done by the plaintiff firm, either by one or both of its members, or by some one with the knowledge and direction of the members of the plaintiff firm, or either of them, and unless it does so appear the plaintiff can not be held responsible for such act, and the plaintiff's right to recover would not be lost by reason thereof.¹

¹ Melhorn, J., in *Carnahan v. Penn. Fire Ins. Co.*, Hancock County Common Pleas.

Sec. 1908. Defense—That fire was caused by willful act of procurement.

After reciting the charge as made by the pleadings and the position of the plaintiff thereon that the fire was caused by the willful act or procurement by the plaintiff, the instruction may proceed as follows:

To establish the truth of this charge the burden of proof is on the defendant.

The rule that applies to criminal acts when the party is charged with the unlawful act of burning property that the jury must be satisfied beyond a reasonable doubt of the truth of the charge does not apply in civil cases. The jury are permitted to find for or against the respective parties in the action by a preponderance of the evidence. The defendant must satisfy you by a preponderance of the evidence that the allegations contained in its answer upon this ground of defense are true, and unless this is done you can not find in favor of the defendant upon this issue.¹

¹ Melhorn, J., in *Carnahan v. Penn. Fire Ins. Co.*, Hancock County Common Pleas.

Sec. 1909. Insurance on steamboat—Negligence of owner's agent—Seaworthiness of boat.

“If she was in a seaworthy condition, and sufficiently manned for such a boat so lying up, and the loss was occasioned by the

mere negligence and want of proper care of her watchman and those having the care of her, the plaintiff will be entitled to recover, if he has proven all other necessary facts, for such negligence is a peril insured against. But if the negligence consisted in allowing the boat to become unseaworthy, and she was lost thereby, there can be no recovery.

“The boat need not have been sufficiently seaworthy to perform a voyage, but it must have been for her preservation under all ordinary circumstances while tied up during such period of non-user, and if she encountered a peril insured against which she would have safely resisted if seaworthy, but in consequence of being unseaworthy was sunk by encountering a peril insured against, then the plaintiff can not recover.

“And further, if the boat was seaworthy when laid up, but thereafter her seams were suffered to become open by exposure, which the plaintiff failed to have properly caulked, and she was not in a safe and seaworthy condition requisite for her safety when tied up, then the plaintiff can not recover.

“The boat must have been kept in such condition as to be reasonably sufficient to withstand the ordinary perils attending a boat so laid up at that time and place. If she was not so kept, the plaintiff can not recover, no matter what peril she may have encountered. If she was, and encountered wind and waves by which she broke her spars, was driven against the bank, and careened so as to be thrown on her side in such a way as to take in water at her seams which were far enough above the water-line so as not to endanger her safety while lying up under ordinary circumstances, and sunk in consequence thereof, then the plaintiff can recover, if he had provided and kept at the boat a force of men sufficient to take care of the boat under ordinary perils, whether all such men were directly in his employ and pay or not.”¹

¹ From *Insurance Co. v. Parisot*, 35 O. S. 35.

Sec. 1910. Accident insurance—Proof of claim.

The case from which the following instruction was taken alleged that immediately after the accident and death due proof

and proper notice thereof, together with full name and address of the insured, was given to the defendant. That on a certain day named, due and affirmative proof of death, resulting from external, violent, and accidental means, was furnished to the defendant.

If you find from the evidence that blank forms were provided by the company for plaintiff, and the same were filled out, sworn to before a notary public by plaintiff and others, and transmitted to H., state agent for the company, by mail, and the same were received by the company, and thereupon the company in reply thereto notified the plaintiff by the letter, "exhibit A," that her claim under accident policy No. —, written by this company on the life of G. S., has been disallowed, you may treat the condition of the policy as a proof of death of the insured, as having been complied with on the part of the plaintiff, or that the defendant waived further proofs of death.¹

¹ Voris, J., in *Worstler v. Travellers' Ins. Co.*, Summit County Common Pleas.

Sec. 1911. Accident insurance—What necessary to recovery for death upon.

To enable the plaintiff to recover, it must appear from a preponderance of the evidence that the death of the insured resulted from bodily injuries, occurring during the term of the insurance, through external, violent, and accidental means independent of all other causes, and that his death resulted from such injuries alone within ninety days.

The burden is upon the plaintiff to establish by such preponderance of the evidence that his death resulted from such injuries, and that she made other allegations in the petition controverted by the defendant's answer.

If the alleged fall was the proximate cause of his death, though he may have had internal disease or bodily infirmity at the time of such fall, but from which he would not have died but for the injuries resulting from the alleged fall, so that you can say that his death did not result wholly or partly, directly

or indirectly, from disease or bodily infirmity other than that resulting from the injury, then the fact that he had such disease or bodily infirmity at the time of the alleged injuries would not be sufficient to defeat his right to recover.

By proximate cause is meant a cause from which the death of the insured, in the natural and ordinary course of events, would be likely to follow; but if the death did result wholly or partially, directly or indirectly, from disease or bodily infirmity existing at the time of the fall, so that you can say from the evidence that such disease or bodily infirmity was the proximate cause of his death, she can not recover.¹

¹ Voris, J., in *Worstler v. Travellers' Ins. Co.*, Summit County Common Pleas.

Sec. 1912. Consideration—Adequacy or sufficiency not inquired into.

Was this a sufficient or adequate consideration for the assignment from J. L. to plaintiffs? While it is necessary that the consideration for the assignment be of some value, yet the law will not enter into an inquiry as to the adequacy or sufficiency of the consideration for the assignment, but will leave the parties to be the sole judges of the benefits to be derived from this contract, unless the inadequacy or insufficiency of consideration is so great as of itself to prove fraud or imposition.¹

¹ Horace L. Smith, J., in *Sabin v. Corcoran*, 52 O. S. 636. See *Judy v. Louderman*, 48 O. S. 562.

Sec. 1913. Insurance — Application for — Statements, how treated.

The plaintiff (widow) is bound by the policy and statements made by her husband, Dr. M. O'H., which are a part of the contract. The application and statements therein are warranties, and are binding on her as if made by her, if by its terms the application did warrant. The insurance company had a right to make such application to be a part of the policy, and had a right to rely upon such warranties. The statement in his

application that he had never been rejected was material, and was warranted to be true by him; and it would be a fraud on the defendant for him to state that he had never been rejected. But if at the time the company received this last application it knew that Dr. M. O'H. had been rejected by it in the past, then that fact would not operate in this case to debar the recovery; for the company, in such case, issuing the policy with the knowledge of the untrue fact, is barred from setting it up as a defense.

So, too, as to representations and warranties as to his health and his relatives; he warranted these statements true, and they were matters upon which the company had a right to rely. However, bearing upon all these answers and warranties, Section 3625 of the statutes of this state provides and says that no answer made in his application for a policy shall bar the right to recover, unless it be proved that the answer was willfully false and fraudulent; that it was material, and induced the company to issue the policy, and but for that, the policy would not have been issued. This is giving the substance or meaning of the statute referred to, and is stated by me as the law governing this case.

I have said to you that all these answers were material; but unless they or some of them were willfully false, and made by Dr. M. O'H., and induced the company to issue the policy, and but for such answer the policy would not have been issued, then any such untrue answer could not operate as a bar to recovery herein.¹

¹ G. F. Robinson, J., in *Total Abstinence Life Association of America v. O'Hara*. Dismissed in supreme court No. 3357. Charge approved by Circuit Court, Portage County.

Sec. 1914. Insurance—Life—Misrepresentations made by insured.

“A misrepresentation or false statement made in his application for insurance, by a person whose life is insured, respecting a material fact, avoids the policy issued upon that application, and this whether the misrepresentation was made innocently or

designedly. If, therefore, the jury believed from the evidence that the insured, in his application for the policy or certificate here sued on, stated that he had no serious illness, or stated that he had not had during the last seven years any disease or severe sickness, and that either of those statements were false in any respect, and are deemed by the jury material, then whether the insured intended to deceive or not, the said policy or certificate is void, and the jury should find for the defendant, unless they further believe that the *avoidance* of the policy or certificate has been waived by the defendant.”¹

¹ *Schwarzbach v. O. V. Protective Union*, 25 W. Va. 640.

Sec. 1915. Same, continued—What constitutes waiver of misrepresentations.

“There can be no waiver of the avoidance of a policy by reason of material false statements or misrepresentations in the application, unless the acts relied upon as showing the waiver were done with full knowledge of the facts. While, therefore, the receipt of premiums or assessments with full knowledge on the part of the defendant of facts working a forfeiture of the policy, might constitute a waiver of such forfeitures, yet the receipt of such premiums or assessments in ignorance of such facts would not constitute a waiver.”¹

¹ *Schwarzbach v. O. V. Protective Union*, 25 W. Va. 640.

Sec. 1916. Concealment of material fact concerning insurance, or subject thereof.

Concealment is the designed and intentional withholding of any fact, material to the risk, which the assured in honesty and good faith ought to communicate to the company. Such alleged act of concealment involves, not only the materiality of the fact claimed to be withheld, and which ought to have been communicated, but also the design and intention of the insured withholding it.

The condition of the policy regarding a concealment must be construed in the light of the definition of concealment just given.

Where the materiality of the facts against the concealment of which the policy provides does not appear from the contract of policy, as it does not in this case, both the question of materiality of the fact alleged to have been concealed, as well as the intent of the insured in so concealing the same, are to be drawn or found from the facts and circumstances disclosed by the evidence. So it is for the jury to determine what fact or facts were concealed, whether they were material. as well as the intent with which the same were concealed.¹

So if the jury find, etc.

In determining the intent with which the fact, was concealed, if the jury find that it was concealed, it will be essential for the jury to ascertain and find whether an inquiry was made concerning the fact, because the law makes a distinction between cases where an inquiry is made and those where none is made. The rule of law applicable to such question is that when no inquiries are made, the intention of the assured becomes material, and to avoid the policy, the jury must find, not only that the matter was material, but also that it was intentionally and fraudulently concealed.²

So, therefore, if the jury find, etc.

¹ *Ins. Co. v. Colo. L & M. Co.*, 50 Colo. 424, 116 Pac. 154; *Am. Ann. Cas.* 1912, C. p. 597.

² *Id.* *Alkan v. Ins. Co.*, 53 Wis. 136; *Ins. Co. v. Monroe*, 101 Ky. 12; *Arthur v. Ins. Co.*, 35 Ore. 27, 57 Pac. 62, 76 Am. St. 450.

CHAPTER CX.

INTOXICATING LIQUOR.

SEC.

1917. Action by wife against person selling or furnishing liquor to intoxicated person—Liability of person furnishing.

1918. Evidence of sales made after suit.

1919. Who is keeper of place.

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SEC.

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1926. What constitutes sale within two miles of agricultural fair.

1927. What is intoxicating liquor.

1928. What is agricultural fair.

1929. Sales by agent or barkeeper.

Sec. 1917. Action by wife against person selling or furnishing liquor to intoxicated person—Liability of person furnishing.

By statute it is made unlawful and punishable for any person to furnish to any person who is at the time intoxicated, or in the habit of getting intoxicated, any intoxicating liquors whatsoever, unless given by a physician in the regular course of his practice.

This law makes it unlawful to furnish intoxicating liquors contrary to its provisions. If the defendant so furnished intoxicating liquors to the husband of the plaintiff, he being at the time, to the knowledge of the defendant, intoxicated, or in the habit of getting intoxicated, the act or acts of so furnishing liquor were unlawful.

The defendant can only be made responsible for such instance of intoxication of the plaintiff's husband as may have been caused in whole or in part by liquors which he may have so illegally sold or furnished.

If A. B. was on a particular occasion or occasions intoxicated during said period, to which intoxication the liquors of defendant, so sold or furnished to A. B., did not contribute in whole or in part, the defendant is not responsible for such intoxication. But if defendant's liquor, so sold or furnished to A. B. during such period, in part caused the intoxication of said A. B., the defendant would be responsible for such instance of intoxication, although liquor which was not obtained from defendant also in part caused or contributed to such instance of intoxication. And if the liquor so sold or furnished by defendant to A. B. caused his intoxication, either alone or in connection with liquor not obtained from defendant, in a sufficient number of instances to satisfy you that A. B. was habitually intoxicated by such liquor of defendant acting alone, and also acting with such liquor of others, the jury should find that defendant caused the habitual intoxication of A. B.

But if the liquor of defendant, so sold or furnished, caused in whole or in part the intoxication of A. B. in a less number of instances than is required to make him habitually intoxicated, yet, if defendant's liquor, thus sold or furnished to A. B., caused his intoxication in one or more instances, it would be sufficient, on this second point, to authorize a finding for plaintiff. Whether the intoxication which may have thus been caused by defendant was in but a single instance, or occasional, or habitual, will be an important subject of consideration upon the point of injury to plaintiff's means of support, or in assessing damages.

If it be found that A. B. was intoxicated in any instance or instances, as to which the jury do not find that the defendant's liquor so sold or furnished to A. B., caused the intoxication in whole or in part, such instances of intoxication can only be considered by you upon the question whether A. B. was in the habit of getting intoxicated, and the defendant should not be

held responsible for any injury to the plaintiff which may have resulted from such intoxication.¹

¹ From *Sibila v. Bahney*, 34 O. S. 399. See *Baker v. Beckwith*, 29 O. S. 314.

Sec. 1918. Evidence of sales made after suit.

If it be found from the proof that defendant, since the commencement of the action, has sold intoxicating liquors to plaintiff's husband in violation of law, that would afford no ground whatever for a recovery on the part of the plaintiff; but if it be found that the plaintiff ought to recover for intoxicating liquors sold to her husband during — years previous to the beginning of this suit, the jury has a right to consider the fact that it has been repeated, and the unlawful sale to him indulged in since its commencement, for the purpose of throwing light upon the mind of the defendant at the time he sold the liquors during the four years prior to the filing of plaintiff's petition; the jury has a right to consider it in aggravation of damages, or as a reason why they should or may be increased. Her right to recover can not be founded upon any such sales, but the most that can be done would be to increase her recovery by way of exemplary damages for such sales, if she is otherwise entitled to a verdict.¹

¹ From *Bean v. Green*, 33 O. S. 444.

Sec. 1919. Who is keeper of place.

If the defendant had the possession, care, and control of the room, and managed, conducted, and controlled the business transacted therein, and sold liquor in violation of law, then he was the keeper of the room within the meaning of the statute, whoever may have been the actual owner of the property.¹

¹ From *Schultz v. The State*, 33 O. S. 276.

Sec. 1920. Defendant must know of habit of intoxication— Notice—Damages.

To authorize a recovery it must appear that J. W., the husband of the plaintiff, was a person in the habit of getting intoxicated.

It must also appear that the defendant knew that he was a person in the habit of becoming intoxicated as it appears in the petition. It must appear that the plaintiff gave notice not to sell to her husband intoxicating liquors. This notice must be given in the presence of witnesses or a witness. It must also appear that the notice was given at the time alleged in the petition; it need not be done at the exact time alleged, but near about that time. It must appear that the plaintiff has been damaged in her means of support, or her person, on account of alleged illegal sales, if any were made by the defendant to the husband. Should you find that the defendant sold intoxicating liquors to J. W. in violation of law, within the time charged in the petition, or about the times charged in the petition, and that the plaintiff sustained damages by reason of the intoxication of J. W., caused thereby to her person, property, or means of support, the fact that other persons sold liquor to J. W. in violation of law, within that period, and which liquor may have contributed to increase the intoxication and consequently to enhance the injury resulting to the plaintiff therefrom; such facts, if shown to have existed, will not exonerate the defendant from the consequences of his wrongful acts; but on the contrary, he will still be responsible for all the injury resulting from the intoxication of J. W. to the plaintiff caused by the sales of liquor.

If you can separate the damages resulting from the intoxication caused by illegal sales to the said J. W. by the defendant from the damages resulting from the sales to J. W. by others, you must do so. But if such separation can not be made, you will render your verdict against the defendant for all acts resulting in pecuniary damages to the plaintiff, in person, property, or means of support, by reason of the intoxication of J. W. to which the sales of liquor by the defendant contributed.¹

¹ Gillmer, J., in *Whittaker v. Walsh*, Trumbull Co. Com. Pleas.

Sec. 1921. Selling and furnishing intoxicating liquors to habitual drunkards—What constitutes a sale.

By statute in Ohio it is provided that whoever sells intoxicating liquors to a person in the habit of getting intoxicated

shall be punished as is provided in said statute. It is further provided by the statute, among other things, that whoever buys for and furnishes a person who is in the habit of getting intoxicated any intoxicating liquor shall be punished as is provided in said statute.

You will observe that there are two kinds of offenses charged in the several counts of the indictment in this case. One is the selling of intoxicating liquor to a person in the habit of getting intoxicated, and the other is that of furnishing intoxicating liquor to a person in the habit of getting intoxicated.

To constitute a sale a person procuring liquor must have paid for the same or agreed to pay for the liquor. As matter of law, the supplying of intoxicating liquor to a person in the habit of getting intoxicated, to be drunk by him, is the furnishing of liquor within the meaning of our statute, although it may have been purchased by another and supplied by the seller to a person in the habit of getting intoxicated in pursuance of such purchase.¹

If a person in the habit of getting intoxicated should go into a saloon with another person, and such other person should buy from the saloonkeeper intoxicating liquor for himself and such habitual drunkard, to be drunk by them there before the saloonkeeper, such act would be a furnishing by the saloonkeeper to such habitual drunkard, although such third person paid for the intoxicating liquor.²

¹ See 25 O. S. 381.

² Nye, J., in *State v. Kelley*, Lorain Co. Com. Pleas.

Sec. 1922. Same, continued—Intoxication defined.

“A person may be said to be intoxicated when he is so much under the influence of intoxicating liquor that he is unfitted and disqualified from attending to and performing the usual duties and business of life. Intoxicating liquor affects different individuals in different ways. One individual it renders dull and stupid, so that while he may possess the powers of locomotion his intellect is so stupefied that he is wholly incapable

of attending to any matter of business; another is rendered excited and noisy, and for a time positively insane, although he may be physically stronger and more active than when sober. In this instance the effect is upon the mind, disqualifying the man intellectually from being fit to be entrusted with the performance of any important business.

“On the other hand, another person will exhibit intoxication by losing all control over his muscular action, so that he will be unable to walk or move, while his mind may be tolerably clear and capable of comprehending a matter of business. Still the man is physically disqualified by the intoxication from attending to his ordinary business. There are other persons who are mentally and physically able to drink large amounts of intoxicating liquors without losing their mental ability, or all control over their muscular action; but yet the effort to maintain this self-control is so great that they are wholly incapable of attending to any business, or performing any duty resting upon them as men and members of society. There are degrees of intoxication. In order to be intoxicated it is not necessary that the person should be so drunk as to be wholly without the ability to think or move; it is enough if he is so far affected as to render him unfit and disqualified for the performance of ordinary callings—so affected that it would be unsafe to trust him with the driving of a team, the care of a mill, the making of a contract, or the sale of property, with the steering of a steamboat, with the prescribing as a physician, or the giving of advice as a lawyer. A person so affected by intoxicating liquors is truly in a state of intoxication and can truly be said to be intoxicated.”¹

¹ Nye, J., in *State v. Kelley*, Lorain Co. Com. Pleas.

Sec. 1923. Same continued—Habitual drunkard defined.

This word implies more than a single act of intoxication—more than an occasional act of intoxication. It implies a series of acts; acts of intoxication so often repeated that it may be reasonably expected that the individual will become intoxicated whenever he can obtain the means of so doing. When a

person has acquired such a taste for intoxicating liquors, and has so far lost the control of his will that he will usually drink to excess whenever he can obtain it, he has emphatically acquired the habit of getting intoxicated. Nor need the acts be repeated in rapid succession; it is enough to constitute the habit if the person gets intoxicated whenever the opportunity offers, although these opportunities may be at considerable intervals in lapse of time. The habit is still formed, the individual becomes intoxicated whenever the means are at his command.¹

¹ Nye, J., in *State v. Kelley*, Lorain Co. Com. Pleas.

Sec. 1924. Sale of intoxicating liquors within two miles of agricultural fair.

Your attention is directed to the material things which it is necessary for the state to make out to entitle it to the verdict of guilty as charged in the indictment. First: That the sale of intoxicating liquors was made by the defendant to C. W.. Second: That said sale of intoxicating liquors was made within two miles of the place where an agricultural fair of the — County Agricultural Association was being held. Third: That said offense was committed in the County of —, and State of Ohio. Fourth: That said offense was committed on or about the — day of —, 19—. If you should find from the evidence that said offense was committed on or about that time, near to that time, that would be sufficient so far as the date is concerned, provided said offense was committed during the time that the agricultural fair of the — County Agricultural Association was being held. The state must establish each of the foregoing propositions by evidence that satisfies your minds of their truth beyond a reasonable doubt.¹

¹ Nye, J., in *State v. Hunter*, Lorain Co. Com. Pleas.

Sec. 1925. Same, continued—What constitutes a sale.

You are now instructed upon each of the material things which it is necessary for the state to make out before it is entitled to a verdict of guilty at your hands.

To constitute a sale the person procuring the intoxicating liquors must have paid for the same, or agreed to pay for the liquor at the time he purchased it. If you find from the evidence that the offense was committed on the evening of the — day of —, 19—, that would be sufficient so far as the date is concerned, to warrant a conviction upon a count which charges an offense to have been committed on the — day of —, 19—, providing said offense was actually committed during the time the agricultural fair of the — County Agricultural Association was being held. This becomes a question of fact for you to determine from all the evidence in the case whether the said defendant did sell intoxicating liquors to the said C. W. on the night of the — day of —, 19—.¹

¹ Nye, J., in *State v. Hunter*, Lorain Co. Com. Pleas.

Sec. 1926. What constitutes sale within two miles of agricultural fair.

If you find from the evidence given you in this case that the — County Agricultural Society held an agricultural fair in — County, which opened its exhibits to visitors on the morning of — day of —, 19—, and continued open from day to day, every day, until the afternoon or evening of —, 19—, except that its grounds were closed to the public during the nights, and you further find that substantially all the exhibits of said agricultural fair remained on the grounds of said — County Agricultural Society, both day and night during said period, you are instructed that the place where the said agricultural fair was thus held was, in contemplation of the statutes, a place where agricultural fair was being held, during all the time both day and night, from the time that said agricultural fair was thus opened for its exhibition to the public, from the morning of —, 19—, or afternoon or evening —, 19—; and the sale of intoxicating liquors within two miles of the place where the agricultural fair was being held would be a violation of the statute. It would, therefore, be unlawful to sell intoxicating liquors within two miles of the place where

the agricultural fair was thus being held, from the time of its opening to its close.

It then becomes a question of fact for you to determine from all the evidence in the case, if you find that intoxicating liquors were sold by the defendant to said C. W. as claimed by the state, whether said sales, or either of them, were made during the time that said agricultural fair was being held.¹

¹ Nye, J., in *State v. Hunter*, Lorain Co. Com. Pleas.

Sec. 1927. What is intoxicating liquor.

Upon the subject of intoxicating liquors you are instructed that whisky is an intoxicating liquor. If, therefore, you find, from the evidence which has been submitted to you in this case, that the defendant sold whisky to the said C. W., the sale of whisky would be the sale of intoxicating liquor.¹

¹ Nye, J., in *State v. Hunter*, Lorain Co. Com. Pleas.

Sec. 1928. What is an agricultural fair.

It becomes important for the jury to determine from the evidence whether an agricultural fair of the — County Agricultural Society was being held at the time the alleged sales, or either of them, are said to have been made. You are instructed that, "A place where industrial products of the people in agriculture, manufacture and the arts are received and placed on exhibition for the purpose of displaying them and awarding prizes as the reward for excellence, is an agricultural fair." And one who sells intoxicating liquors within two miles of the place where the agricultural fair is being held, is liable under the state statute.¹

¹ Nye, J., in *State v. Hunter*, Lorain Co. Com. Pleas.

Sec. 1929. Sales by agent or barkeeper.

If you find from the evidence which has been given to you in this case, that there was a sale of intoxicating liquors to said C. W. by the agent of the defendant, acting in the line of his

duties, the defendant would be liable for the acts of his agent, thus acting in the line of the agent's duty and authority. If you find from the evidence that the defendant placed someone, even temporarily, behind the bar to wait on customers, and make sales, such person so placed there would be the agent of the defendant in waiting on customers and making such sales, while thus in the employ of the defendant. If you find from the evidence that there was a person behind the bar in defendant's place of business in the act of selling articles there kept for sale, with the knowledge of the defendant, that act may be considered by you in determining whether said person was agent of the defendant, and acting with the authority of the defendant. And if you find from the evidence that someone went into the defendant's place of business and went behind the bar and sold intoxicating liquors without the knowledge or consent of the defendant, defendant will not be liable for any sales made by such unauthorized person. The defendant had a right to go into his saloon at any time during the agricultural fair, and there would be no liability therefor. If the defendant made no sales of intoxicating liquors, either by himself or an agent authorized in the matter, he could not be legally convicted.¹

¹ Nye, J., in *State v. Hunter*, Lorain Co. Com. Pleas.

CHAPTER CXI.

LANDLORD AND TENANT.

SEC.
1930. Duty of landlord to repair walks, remaining under his control, and part of common walk.

SEC.
1931. Same continued—Defects known to plaintiff.
1932. Whether premises rendered unfit for occupancy on account of fire, so that rent may not be collected.

Sec. 1930. Duty of landlord to repair walks—Remaining under his control, and part of common walk.

It is the duty of a landlord who lets premises to which there is a common walk, which remains under his own control and is not let to any of the tenants, to use reasonable care and diligence in keeping that walk in repair; and if, by his failure to use that sort of care and diligence, the walk gets out of repair, and a party is injured by reason thereof, without having been guilty of any negligence which contributed to the injury, then he or she would be entitled to recover.

If the walk upon which the plaintiff is alleged to have been injured was a common way, and was under defendant's control, it was his duty to see to its condition, and the fact, if such were the fact, that the plaintiff did not inform defendant of its unsafe condition does not necessarily preclude plaintiff's recovery.

The renting or leasing of a house will include everything belonging to it, or which is reasonably necessary to its enjoyment. It will also include all usual and accustomed ways to the house. Whenever a house is rented or leased, all the means to which the lessor is entitled to attain the use and enjoyment of the house pass by the renting or leasing to the tenant. These are called appurtenances and pass to the tenant by the renting or leasing of a house without being made. If you find from the

testimony and from all the circumstances of the case that so much of the yard and the walk therein, in the rear on No.— — Street as would be included within the lines of the house so numbered prolonged, are reasonably necessary to the enjoyment of that house, then so much of the yard in the rear of No. — — Street, and the walk therein, included between the lines of the house prolonged, were included in the renting of the house to the plaintiff, and were under her care and control, and she can not recover in this action, although other tenants of the blocks of buildings of which said No. — — Street is one have a right of way over the walk.

The fact that other tenants of the row had a right of way in the walk extending through the yard of each of the others does not necessarily show that the custody and control of such part is not in the tenant through whose yard it passes.¹

¹ From *Emery v. Mary A. Dee*, supreme court, 27 W. L. B. 160, No. 1542. H. D. Peck, J.

Sec. 1931. Same, continued—Defects in walk known to plaintiff.

The plaintiff admits that she knew of the defects in the walk. Her knowledge of the defects is a prominent fact in the case to be taken into consideration with all the other facts and circumstances in determining the question whether her own negligence contributed to the accident by which she claims she was injured. And if you should find that by her own carelessness she did contribute to the accident, she can not recover.

The law does not measure degrees of carelessness, and if you find that the plaintiff in any material degree contributed by her carelessness to the injury, she can not recover.

Knowing the defective condition of the walk when she rented the premises, plaintiff was therefore bound to use such increased care in using the walk as its defective condition required, and she can not excuse herself for the want of such care by the plea that she was not responsible for the defects themselves.¹

¹ From *Emery v. Dee*, supreme court, No. 1543.

Sec. 1932. Whether premises rendered unfit for occupancy on account of fire—So that rent may not be collected.

The question, then, is whether in this case there was such a destruction or such an injury to the premises by the fire and water—by what occurred at that time resulting from the fire—as that it became unfit for occupancy; because, to justify a lessee in abandoning premises, or insisting upon the termination of a lease, the injury or destruction must go to the extent of rendering the premises unfit for occupancy. It must amount to such destruction as that the premises are unfit for occupancy; not that there must be an absolute wiping out of the building—its absolute destruction from the face of the earth—but it must be such an injury, or the injury must go so far toward total destruction, as that it is no longer suitable to be used for commercial purposes, or for such purposes as it was fairly and reasonably designed to accommodate in its original construction. Mere temporary inconvenience occasioned by a fire would not justify or authorize a tenant to vacate premises, nor would it have the effect to terminate the lease. Mere inconvenience, the mere cessation or interruption to business for a day or two, would not have that effect. It must go to the extent of rendering the premises untenable, so that the situation requires a removal elsewhere.

Now, it is hardly within the province of the court to indicate, I think, just what state of facts would justify a removal, or would justify the terminating of a lease. I only propose, in a general way, to give you general rules for your guidance. As I say, mere temporary inconvenience, a mere wetting of the walls by itself, standing alone, as a circumstance, the wetting of the floors, the mere putting out of the fire by flooding a cellar, if it could be removed within a short time, if the effects could be overcome within a short time—any one of these things alone would not constitute such destruction, or such an injury to the premises as would justify a lessee in terminating a lease. Those are all circumstances to be considered, however, together with other

things, with a view of determining whether the building, as a structure, has undergone such injury and such destruction as a whole that it is no longer a structure suitable for the business for which it was designed. If this fire was of such extent and so destroyed these premises as a whole (and I now refer in what I say to the premises as a whole), if they were injured to such extent that there was a burning away of the roof or of the windows, that is spoken of as to make these premises as an entirety unfit for occupancy, unfit to be used in a commercial business, then it was the right of the lessees to vacate the premises and terminate this lease; it was their right to insist upon its being terminated, if such a condition of things occurred. If there was such a destruction or such injury, if it went to the extent that the building as a whole was untenable, unfit for occupancy, then they would have the right, we think, under the statute, under this lease, to insist upon its termination.¹

¹ Carlos M. Stone, J., in *Weil, Joseph & Co. v. Gilchrist*. Judgment affirmed, R. S., sec. 4113. The injury contemplated by the statute is a total destruction. *Suydam v. Jackson*, 54 N. Y. 450; *Stitphen v. Seebass*, 12 Daly, 139; *Hillard v. Coalles*, 41 O. S. 662.

CHAPTER CXII.

LARCENY.

SEC.

1933. Larceny defined.

1934. Grand larceny—Essential and material allegations to be proved.

1935. What constitutes a taking and carrying away.

1936. Return of property upon being discovered does not change offense.

1937. What constitutes larceny of property where owner voluntarily parts with its possession.

1938. Grand larceny committed by destruction of property—Intent—How proved.

1939. Larceny of lost money—What essential to constitute larceny by finder.

1940. Value of property must be proved.

SEC.

1941. Larceny of money found by undertaker on dead body drowned in flood.

1. The indictment, plea and burden.

2. Presumption of innocence—Reasonable doubt, etc.

3. The statute.

4. To steal, defined.

5. Anything of value, defined.

6. Ownership of property in heirs.

7. Duty of defendant as coroner as to body and money found thereon.

8. If defendant took money feloniously but a short time.

9. Intent to steal.

1942. Larceny—Short charge in.

Sec. 1933. Larceny defined.

The statute under which this indictment is brought provides that “whoever steals anything of value is guilty of larceny,¹ and shall be punished as is provided in the statute.” It may aid you in arriving at a just and proper verdict by defining some of the terms involved in the crime charged in this indictment.

To steal is to take and carry away feloniously personal goods of another,² to take without right or leave. Larceny is the wrongful taking and carrying away by any person of the mere personal goods of another from any place, with a felonious intent to convert them to his (the taker’s) own use, and make them his own property without the consent of the other. Again,

larceny is defined to be the wrongful or fraudulent taking and carrying away without color of right the personal goods of another, from any place, with the wrongful intent to convert them to his (the taker's) own use, and make them his property without the consent of the owner.

Again, I say to you, larceny is the taking and removing by the trespass of personal property, which the trespasser knows to belong to another, with the felonious intent to deprive him of his ownership therein.³

¹ Code, sec. 12447.

² The word "steal" implies a carrying away. *State v. Mann*, 25 O. S. 668.

³ Nye, J., in *State v. Michke*, Lorain Co. Com. Pleas. For definition see 2 Bish. Cr. Law, sec. 758; Clark's Cr. Law, 241; Hawley's Cr. Law, 188.

Sec. 1934. Grand larceny—Essential or material allegations to be proved.

(Precede by statement of allegations of the indictment.)
Material allegations of the indictment and the things which it is necessary for the state to prove before it would be entitled to a conviction at your hands are as follows: First. That the personal property named in the indictment or some part of it was stolen. Second. That the defendant here on trial committed the offense. Third. That the said property was the property of E. M. Fourth. That said offense was committed within the County of —, State of Ohio. Fifth. That the offense was committed on or about the — day of —, 19—.

Sec. 1935. What constitutes a taking and carrying away.

In order to constitute the offense of larceny there must be an actual taking or severance of the thing from the possession of the owner, for, as every larceny includes a trespass, if the party be not guilty of a trespass in taking the goods, he can not be guilty of a felony in carrying them away.¹

There must also be a carrying away of the goods taken. When this is done the offense is complete, the crime is committed, and

can not be purged by a return of the goods, though the possession be retained but for a moment.²

The felony lies in the very first act of removing the property; therefore the least removing of the entire thing taken, with an intent to steal it, if the thief thereby for an instant obtain the entire possession of it, it is an asportation, though the property be not removed from the premises of the owner, nor retained in the possession of the thief.³

¹ *Eckels v. State*, 20 O. S. 512; *Roscoe's Crim. Ev.* 587; 2 *Russ. on Crimes*, 5.

² *Id.* 3 *Greenleaf's Ev.*, sec. 156; 2 *Russ. on Crimes* 6.

³ *Eckels v. State*, 20 O. S. 512, 513. The thing need not be taken into the manual possession of the thief. *Lem. Doss v. State*, 21 *Tex. App.* 505.

Sec. 1936. Return of property upon being discovered does not change offense.

The jury are instructed that if the defendant had actually taken the money into his hand, and lifted it from the place where the owner had placed it, so as to entirely sever it, he would be guilty of larceny, though he may have dropped it into the place in which it was lying, upon being discovered, and never have had it out of the drawer.¹

¹ *Eckels v. State*, 20 O. S. 508.

Sec. 1937. What constitutes larceny of property where owner voluntarily parts with its possession.

You are instructed that to constitute larceny in a case where the owner voluntarily parts with the possession of his property, two other conditions are essential. 1. The owner, at the time of parting with the possession, must expect and intend that the thing delivered will be returned to him or disposed of under his direction for his benefit. 2. The person taking the possession must, at the time, intend to deprive the owner of his property in the thing delivered. But where the owner intends to transfer, not the possession merely, but also the title to the property, although induced thereto by the fraud and fraudulent pretenses of the taker, the taking and carrying away do not

constitute a larceny. In such case the title vests in the fraudulent taker, and he can not be convicted of the crime of larceny for the simple reason that, at the time of the transaction, he did not take and carry away the goods of another person, but the goods of himself.¹

¹ From *Keliogg v. State*, 26 O. S. 15, 18, 19. See *State v. Coombs*, 55 Me. 477; *Beatty v. State*, 61 Miss. 18; *Snapp v. Com.*, 82 Ky. 173. As to manner of taking see *Clark's Cr. Law* 248.

Sec. 1938. Grand larceny committed by destruction of property—Intent—How proved.

The state claims that the defendant here on trial took the property named in the indictment and carried it and conveyed it away and destroyed it by burning it up.

The state further claims that defendants took said property with intent to convert it to their own use and then destroy it, for the purpose of depriving the owner of said property.

On the other hand, the defendants deny that they took the property with intent to convert it to their own use, and they further deny that they took the property at all, and they deny that they burned or destroyed the property, and deny that they had anything whatever to do with it.

Now, gentlemen, if you find from the evidence given you in this case that the defendants took the property named in the indictment, or any portion thereof, it will be important for you to determine with what intent they took said property.

Intent can rarely be proved by the direct evidence of the condition of the person's mind, hence the presence or absence of intent must be gathered by considering all the facts and circumstances, to determine whether the acts were accompanied by a criminal purpose or an honest purpose.

If you find from the evidence that the defendants here on trial feloniously took the property named in the indictment, with intent to convert it to their own use, without the consent of the owner thereof, then I say to you that such an act would constitute a larceny of the property so taken.

Again, I say to you if you find from the evidence given you in this case that the defendants here on trial feloniously took said property with intent to destroy it, and thus deprive the owner of it without the owner's consent, such act would constitute larceny of said property.

If you find from the evidence that has been given you on the trial of this case that the defendants here on trial took said property, it will be important for you to determine with what intent they took it. If you find from the evidence that the defendants took said property without the consent of the owner and failed to return it, that fact may be considered in determining with what intent the defendants took the property at the time they took it.

Again, if you find from the evidence that the defendants took said property without the consent of the owner thereof, and soon thereafter destroyed it by burning it up, that fact may be considered by you in determining with what intent they took said property.¹

¹ Nye, J., in *State v. Mischke*, Lorain Co. Com. Pleas.

Sec. 1939. Larceny—Of lost money—What essential to constitute larceny by finder.

“Though the money was actually lost and the defendant found it, and at the time of finding supposed it to be lost, and appropriated it with intent to take entire dominion over it, yet really believing that the owner could not be found, that was not larceny and he can not be convicted. The intent to steal must have existed at the time of the taking. It is not enough that he had the general means of discovering the owner by honest diligence. He was not bound to inquire on the streets or at the printing offices for the owner, though if, at the time of the taking, he knew he had reasonable means of ascertaining that fact, that might be taken as showing a belief that the owner of the money could be found. In order to convict, it must be shown that the taking of the property was with felonious intent; that is, with intent to steal under the definition given; and it

is not sufficient that subsequently after finding the money it was converted to his own use with felonious intent. The intent must have existed at the time of the finding.”¹

If a person finds goods that have actually been lost, and believing at the time, or having good reason to believe, that the owner can be found, but takes possession with intent to appropriate the same to his own use, he is guilty of larceny.²

¹ From *Brooks v. The State*, 35 O. S. 46. For another charge and authorities, see *Thompson's Trials*, sec. 2202.

² *Baker v. State*, 29 O. S. 184; *Regina v. Thurborn*, 1 Dennison C. C. 387; *Regina v. Wood*, 3 Cox C. C. 453; *Clark's Cr. Law* 255.

Sec. 1940. Value of property must be proved.

Before the defendant can be convicted, you must be satisfied that the property claimed to have been stolen is of some value. If the state has failed to affirmatively prove that the property was of some value, then it is the duty of the jury to acquit the defendant. This fact must be proved as other facts.¹

¹ *State v. Krieger*, 68 Mo. 98.

Sec. 1941. Larceny of money found by undertaker on dead body drowned in flood.

1. *The indictment—Plea and burden.* Now, gentlemen of the jury, the indictment charges that the defendant, O., did on ———, in Franklin county, Ohio, unlawfully steal, take and carry away ——— dollars in money the personal property of S. S. *et al.*, heirs at law of S. S., deceased.

The defendant pleads not guilty.

Gentlemen, there is but one question of fact for you to decide; that is, whether defendant at the time he took the money intended to unlawfully steal the same.

The burden is on the state to prove the defendant guilty beyond a reasonable doubt.

2. *Presumption of innocence—Reasonable doubt, etc.* The law presumes that he is innocent. notwithstanding the indictment preferred against him.

A reasonable doubt is such a state of mind on the part of jurors after having fairly and impartially weighed and considered all the evidence in the case, that you may have an honest and substantial feeling of uncertainty or doubt of the guilt of the accused, and which rests upon some reasonable ground disclosed by the evidence.

If there is nothing in the evidence that fairly and reasonably causes you to have such reasonable doubt, but, on the contrary, you have an abiding conviction of the guilt of the defendant of the crime charged, your duty is to find him guilty.

But if you have a reasonable doubt of defendant's guilt, your duty is to acquit him.

The jury being the sole judge of the facts to be deduced and found from the evidence, you must also decide what credit is to be given to any and all witnesses.

In considering the weight and credit to be given witnesses, you will consider their testimony in the light of all the facts and circumstances developed and apply such tests as in your judgment you deem proper. You may consider whether any witness has or has not been influenced or biased by any interest in the trial; the demeanor while on the witness stand, whether corroborated or contradicted.

3. *The statute.* Section 12,447, under which this indictment is framed, provides that: "Whoever steals anything of value is guilty of larceny."

4. *To steal, defined.* To steal anything is a criminal taking, obtaining, or converting of the personal property of another with intent to defraud or deprive the owner permanently of the use of it. [*Commonwealth v. Kelley*, 184 Mass. 320.] It is to take the property of another without right or leave, and with intent to keep wrongfully. [46 Fla. 115; 152 Mo. 76; 164 N. Y. 137; 31 Wash. 245.]

5. *Anything of value, defined.* Anything of value, as used in the statute, means and comprehends money which is the subject of the charge in this case.

6. *Ownership of property—In the heirs.* In an indictment for larceny the ownership of the property must be alleged and

be proved to be in some person, although the actual condition of the legal title is immaterial to the person charged. So in this case, it being conceded that the money was found on the body of a dead person, Mrs. S., the court states to the jury that the possession of the same legally belonged to her heirs, the persons named in the indictment, they having the right to demand and take possession of any money found on the body of their mother. [See 111 Ala. 29.]

7. *Duty of defendant as coroner as to body and money found thereon.* It is conceded that the dead body of S. S. was brought to the place of the defendant in a wagon by persons other than the defendant. The court, therefore, instructs the jury that the defendant having received the body under such circumstances, he was bound under the law to yield control and supervision of the disposition of the body as well as of any money found on the body to any one or all of the heirs of S. S. named in the indictment.

The defendant, O., in his capacity as undertaker had no legal right to retain the money found by him on the body until his bill for the services to be rendered by him in the burial of the body was paid.

If the jury find from all the facts and circumstances shown by the testimony, that at the time of finding the money, that the defendant, O., had reasonable ground to believe, from the nature of the property found, or from circumstances under which it was found that if O. did not conceal the fact that he found it, and had possession of it, but that if he dealt honestly with it, the persons to whom the possession rightfully belonged would appear or would be ascertained, then, if you find also that he purposely concealed the fact that he had found the money, and kept the same in his possession for a short time with intent to convert it to his own use, the defendant would be guilty of larceny, provided the jury further find from the evidence that at the time he took the money into his possession he intended to convert it to his own use.

The time referred to as the time when the money came into his possession means and includes the time necessary for the

accused to discover and know the character and value of the property.

Or if the jury find from all the evidence that the defendant learned or knew whose body it was from which the money was taken at the time it was taken, and that he knew any of her sons and daughters, and that he concealed the fact of his finding and possession from them, and that he intended to convert it to his own use at the time of taking possession of the money, or as soon as he discovered and knew the character and value of the property, then the jury should find the defendant guilty.

8. *If defendant took money feloniously but a short time.* If the jury should under the above instructions find that defendant feloniously took the property as specifically covered by the law as given you, and that he kept possession of such money only for a short time, with the intent and purpose aforesaid, the jury are instructed that in the event that such be your finding, the crime of larceny would be complete, and that the giving up of the money to the officers of the law would not have any effect whatsoever.

9. *Intent to steal.* The intent to steal is an essential element in this case. The defendant must have intended to steal the money at the time it came into his possession to warrant conviction. That is, it is essential that he must have formed such intent to convert the money to his own use at the time of taking it and after having had time to discover the character and value of the property.

Intent is a condition of the mind which in many cases can be disclosed by the conduct, declarations and statements made by one accused of crime, from which inferences may be drawn.

The court, therefore, charges the jury that in determining the intent of the defendant in this case, whether or not he intended to steal the money found upon the body of S. S. at the time it came into his possession, you may consider all the evidence touching his conduct during the time the accused had possession of the money; you may consider any and all statements made by him at the time he took the money, or at any

and all times during which he had possession of the money, all things said and done by him during that time, as disclosed by the evidence, together with each and all the facts and circumstances admitted in evidence.

If, under the evidence in the case and by application of the law given you, the jury find that the defendant took the money with intent to steal it, your verdict should be one of guilty, and in such case you will find the value of the money, and state it in your verdict.

If, upon the evidence and the instructions of the court, you find that the defendant did not take the money with intent to steal it, your verdict should be one of acquittal.¹

¹ State v. Osman, Franklin County Com. Pleas, Kinkead, J.

Sec. 1942. Larceny—Short charge in.

GENTLEMEN OF THE JURY: Having heard the evidence and arguments of counsel when you have been instructed as to the law to be applied by you in this case it will be your duty to determine the ultimate fact whether the defendant did or did not steal the money, as charged in the indictment.

The indictment charges that the defendant did on the ———, in this county, unlawfully steal, take and carry away certain money of the amount and value of ——— dollars, the personal property of J. O. E. The defendant, having plead not guilty of the offense charged, the burden is on the state to prove all the elements of the crime of larceny, beyond a reasonable doubt.

It is your duty under the law, notwithstanding the indictment, to presume that the defendant is innocent unless or until the evidence rebuts that presumption. The theory of this rule of presumption is that you enter upon the consideration of the case, as if the defendant is innocent, so that you may fairly and impartially consider the evidence, without bias, prejudice or suspicion because of the indictment.

If the evidence overcomes this presumption then the rule of evidence to be applied by you is the reasonable doubt rule.

A reasonable doubt may be such state of mind on the part of the jurors, after having fairly and impartially weighed and

considered all the evidence, that you may have an honest, substantial feeling of uncertainty or doubt as to the guilt of the accused, and it rests upon some reasonable ground disclosed by the evidence.

If there is nothing in the evidence that may fairly and reasonably cause you to have such a doubt, but on the contrary you may have such feeling in your minds that you have an abiding conviction of the guilt of the accused, it will then be your duty to convict him.

If, however, you entertain a reasonable doubt, which is substantial and not speculative, or captious, then you should acquit him.

What credibility shall be given to the witness or witnesses is within your exclusive province to determine. You will consider their demeanor, their interest, if any, or want of interest, the reasonableness or unreasonableness of their statements, in the light of all the facts and circumstances of the case.

The statute defining the offense of larceny provides that whoever steals anything of value is guilty of larceny. To steal means to take and carry away the property of another with a criminal intent to convert the same to his own use. The intent may be inferred from a wrongful taking and carrying away of the property. Anything of value as used in the statute comprehends money, which is the charge in the indictment, as well as all kinds of personal property. The property must be wrongfully taken from the possession of another person who either owns it or who has its lawful custody.

The money alleged to have been in the possession of the prosecuting witness, M. E., is claimed by him to be—part of it—to belong to his infant son—was, nevertheless, in the custody of M. E. himself; so that if you find that it was taken from him in the manner in which I have described and was, part of it, his son's money, nevertheless, it would constitute larceny.

Forms of verdict will be furnished you and if you find the defendant guilty you will fix the amount and value of the property stolen. If you find him not guilty you will simply say so.¹

¹ State v. —, Franklin Co., Kinkead, J.

CHAPTER CXIII.

LIBEL AND SLANDER.

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Sec. 1943. Libel per se—Defined.

Libel may be defined as follows: "Any false and malicious writing (and I include printing in the term) published of another is libelous *per se* when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hate or contempt, or hinder virtuous persons from associating with him, or which accuses him of crime punishable by the laws of the state, or charges him with conduct, the natural or ordinary results of which would be to prevent him from engaging in and pursuing his vocation or profession (as a teacher, for instance), or otherwise, and thereby deprive him of the earnings thereof, and which he otherwise would have obtained." By publishing it is meant that the matter must be communicated to some other person or persons than its author. But the term should not be restricted to this definition alone. We also use the term publication as signifying the matter published, as well as the act of publishing, and sometimes such an act of publishing as is wrongful.¹

¹ Voris, J., in *Carrier v. Findley, et al. Watson v. Trask*, 6 O. 533: Cooley on Torts, 225, 26.

Sec. 1944. Libel defined—False and malicious publication injuring reputation.

A libel has been defined to be a wrong occasioned by writing or effigy. It has been held in reference to an individual injury

to be a false and malicious publication against one, either in print or writing, or by pictures, with intent to injure his reputation, and to expose him to public hate, contempt, or ridicule. Indeed everything written or printed which reflects on the character of another and is published without lawful justification or excuse is a libel, whatever the intention may have been. Any written words are defamatory which impute to another that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct, or which suggests that the person is suffering from an infectious disorder, or which has a tendency to injure him in his office, profession, calling, trade, or reputation.

A libel consists in the abuse of that constitutional right by maliciously writing or printing, of and concerning another, any language or representation which is false, and the natural tendency and effect of which is to injure such other person in his character and reputation or business in the community where he lives and is known, or in any way to lessen him in public esteem.¹

¹ Dean *v.* Commercial Gazette Co., Hamilton county, Hunt (Saml. F.) J.
Approved by supreme court.

Sec. 1945. Libel—Another definition.

A libel in reference to intentional injury may be defined to be a false and malicious publication against an individual, either in print, writing, or by pictures, with intent to injure his reputation, and expose him to public hatred, contempt or ridicule, or to degrade or lessen his standing and reputation in the community, or to deprive him of the benefit of public confidence, or social intercourse. Indeed, any defamatory language written or printed of another, and published, which imputes to him dishonesty, immorality or dishonorable conduct, or which has a tendency to disgrace or calumniate him, or which imputes to him a want of integrity, or misfeasance or dereliction of official duty, involving moral turpitude, or which is calculated to disparage him in an office of profit, and diminish public confi-

dence in him, is libelous, and renders the person or persons so publishing such language liable in damages to the person defamed, unless such publisher prove the truth of the published matter, which he or it alleges that the libel is true.¹

¹ Jones v. Ohio State Journal Co., Franklin county. Rogers, J.

Sec. 1946. Constitutional limitation of liberty of speech— Scope and extent thereof.

The bill of rights in the Constitution of Ohio declares that “no law shall be passed to restrain the liberty of speech or of the press.” But the same instrument which guarantees the right freely to “speak, write and publish his sentiments on all subjects,” declares that he shall also be “responsible for the abuse of the right,” and that “every person for an injury done to him in his lands, goods, person or *reputation*, shall have remedy by due course of law.”

The liberty of the press, properly understood, is not, therefore, inconsistent with the protection due to private character. It has been well defined as consisting in “the right to publish, with impunity, the *truth*, with good motives, and for justifiable ends, whether it respects government, magistracy, or individuals.” But this liberty or privilege can not be justified when it is exercised to publish libelous matter to the injury of another, unless its truth is pleaded and proved.

Again, the publisher of a newspaper has exactly the same right, and is responsible to exactly the same extent for the abuse of that right, as any other citizen. His right and responsibility in the matter of a publication are no more and no less than that of others under like circumstances.

While editors as well as others have the full liberty to criticize the conduct and motives of public men, and to comment freely on the acts of the government, officers, or individuals, the discussion must be fair and legitimate. If one goes out of his way to asperse the personal character of a public man, and to ascribe to him base and corrupt motives, he must do so at his peril; and must either prove the truth of what he says, or answer in damages to the party injured.¹

“The bill of rights in the Constitution of Ohio declares that every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right, and no law shall be passed to restrain or abridge the liberty of speech or of the press. The publisher of a newspaper has exactly the same right and is responsible to exactly the same extent for the abuse of that right as any other citizen. His right and responsibility in the matter of a publication are no more and no less than that of others under like circumstances.”²

¹ Jones v. Ohio State Journal Co., Franklin county. Rogers, J.

² Dean v. Commercial Gazette Co., Hamilton county. Hunt, J.

Sec. 1947. Constitutional right of liberty of speech and of press—Another form—May not trifle with right of reputation.

As to the liberty of speech and the press, the people of Ohio are so jealous of the right of free speech and the free press, that we have provided in our constitution: “That every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; no law shall be passed to restrict or abridge the liberty of speech or of the press.” * * *

While calling your attention to the constitutional provision, we must not omit to say that this liberty to freely speak, write, and publish one’s sentiments on all subjects is not inconsistent with the protection due to private character, and is coupled with an express declaration of its responsibility for its abuse. It has been well defined as consisting in the right to publish with impunity the truth with good motive and for justifiable ends; but this liberty or privilege can not be justified when it is exercised to publish libelous matter to the injury of another. So far as this action is concerned, this comprehends the privilege of the defendant publishing company to publish the article in contention.¹

No person or newspaper has any right to trifle with the reputation of any person, or by carelessness or recklessness to

injure the good name, profession, or business of another by the publication of libelous matter. It can not do so without answering for the libel in damages; and the greater the influence of the author, if a private individual, and the greater the influence and circulation of the paper, if by a newspaper, the greater the wrong, and makes the duty more imperative to be careful and circumspect in the matter of the publication. No popular greed for defamatory news can be an excuse for its publication; and in no way can it relieve the defendant from legal liability attaching to such publication. The newspaper business like any other must be conducted with due regard to the rights of others. It is a wise rule of law that everyone should conduct himself and his own business affairs in such a reasonable and prudent manner that others be not injured thereby, and the prudence required is commensurate with the hazards occasioned.

Publishers of newspaper articles are subordinate to this rule. As already stated, the truth is privileged when published from good motives and for justifiable ends, but the truth not having been interposed as a defense in this action, the only effect to be given to the evidence offered as to the truth of the alleged libelous matter is to reduce the amount of damages. But this evidence can not operate to defeat recovery for, at least, nominal damages. * * * To reduce your verdict on this ground to nominal damages the proof of the truth of the matter charged should cover the whole of it. That is, it should be as broad as the charge and show that the whole of it is truthful, for if any part of it should appear from the evidence to be false, and that part caused injury to the plaintiff, he would be entitled to recover compensatory damages at least.²

¹ See Cooley on Torts, 255, 217 as to liberty of press.

² Voris, J., in *Carrier v. Findley*, Summit Co. Com. Pleas.

Sec. 1948. Reasonable criticism may be made by newspaper.

The right to exercise reasonable criticism should be extended liberally to the newspaper press.

Just criticism, though severe, may be a great conservator of the character and morals of the people. To truthfully and fairly hold up to public view and condemnation, conduct that is wrongful and detrimental to social well-being is a very useful and important office of the newspaper press; you are therefore instructed that whenever the object of any newspaper publication fairly considered is not to injure reputation, but to correct and to hold up to public condemnation that which is hostile to morality and official integrity, does not come within the definition of libelous matter, so long as the author or authors keep themselves reasonably and in good faith within the line of truthful and wholesome criticism.¹

¹ Voris, J., in *Carrier v. Findley*, Summit Co. Com. Pleas.

Sec. 1949. Duty of jury to decide whether it has libelous tendency and effect—When.

It will be your duty to take the article submitted in evidence, read it carefully in whole and detail, and decide as men of judgment and experience if it had such a tendency and effect as contended for by the plaintiff or any of these tendencies and effects, so far as the reputation and character of the defendant are concerned; or whether, on the other hand, as claimed by the defendant, it can not be fairly said to have had such tendencies or effect, or any of them.

If in your judgment the publication of the article in question had no such tendencies and effect as have been mentioned, it will be your duty to return a verdict for the defendant without proceeding further in the case.

If, however, by reason of the publication of the article in question, you should find that the plaintiff was injured in his character and reputation, and has been injured as claimed in the petition, then your verdict must be for the plaintiff, because it is a presumption of law that anything stated in such publication derogatory or injurious to the character and reputation of the plaintiff is false, and the law further presumes that the defendant, in publishing the same, intended to cause whatever injury naturally would and did result from such publication.

Sec. 1950. Publication construed by court as libelous *per se*.

It being the duty of the court to construe the entire publication in connection with the pleadings, and to give the correct rule to the jury, as to whether or not the alleged publication is libelous *per se*, the court instructs you that, taking the article as a whole and giving it the construction which its language imports, the publication is in and of itself libelous, or, as expressed in the law, libelous *per se*. The language of the article being libelous *per se*, the court instructs you that the presumption is that such libelous matter was false and malicious, and, if the plaintiff makes proof that such libelous matter was published of and concerning him by the defendants, or any of them, it is not necessary in the first instance in making said publication.¹

¹ Jones v. Ohio State Journal Co., Franklin county. Rogers, J. Affirmed, by Cir. Ct.

Sec. 1951. Jury to find whether article published of plaintiff.

Therefore, the first question which you have to consider is this: whether or not the defendants or any of them published the alleged libel of and concerning the plaintiff. If you find from the evidence that the libel was published of and concerning the plaintiff, by the defendants, or any of them, the defendants, or any of them, so found by you to have published said libel of the plaintiff are liable in damages therefor to the plaintiff for the injury thereby sustained, unless such defendant or defendants have established by a preponderance of the evidence the truth of said publication; for proof of the truth is a complete defense to this action.

Sec. 1952. What is a publication, and who are liable as publishers.

The next two questions to which the court will advert are, namely, what is a publication, and who are liable as publishers within the meaning of the law? By publication is meant the communication of the alleged defamatory matter by first print-

ing it in a newspaper and then by circulating the newspaper containing the matter, so as to bring the alleged defamatory matter to the knowledge of one or more third persons (other than the parties to the libel), who read and understood it.

With regard to those who are liable as publishers, the court charges you that all who knowingly cause or participate in the publication of libelous matter are responsible as publishers. This includes all who in any wise aid, assist or advise, or are directly concerned in the production of the defamatory matter with a view to its ultimate publication, that is, all who are instrumental in making or procuring to be made the defamatory publication are jointly and severally liable therefor as publishers. If, therefore, you believe from the evidence that through the instrumentality of T. O. S. J. Co., it printed and caused to be circulated the newspaper carrying the alleged libel, you will be warranted in finding it liable as the publisher thereof. In like manner, if you believe from the evidence that S. G. McC. was managing editor of the newspaper carrying said libel, and participated in having the matter printed and circulated, you will be warranted in finding him responsible as a publisher thereof. Also, if you believe from the evidence that R. F. W. lent his aid, assistance or advice to the ultimate publication of the defamatory matter, or in any wise participated in procuring its publication, you will be warranted in finding him responsible as a publisher thereof. You will, therefore, consider all the facts and circumstances adduced in the evidence at the trial and determine whether or not the said defendants, or any of them, were instrumental in procuring the publication to be made, and if so, you are warranted in holding such as publishers. But, if the defendants, or any of them, merely had knowledge of the proposed publication and consented thereto, but had no authority or control over the matter of its production or publication, and were in no wise instrumental in its ultimate publication, he or they, as the case may be, are not responsible as publishers thereof. If in your inquiry to determine who of the defendants, if any, are responsible as publishers you determine that one or more

of the defendants are not responsible as publishers, that is, were not instrumental in procuring the publication to be made, you need not inquire further as to such defendant or defendants, but will return your verdict for such defendant or defendants.¹

¹ Jones v. Ohio State Journal Co., Franklin county. Rogers, J. Affirmed, by Cir. Ct.

Sec. 1953. Truth as a defense—To be as broad as charge.

In order, however, that proof of the truth of said libelous charges may constitute a complete defense, it is essential that such proof of their truth must be as broad as the defamatory charges contained in the article, and if the truth of one or more of the defamatory charges is not made out by proof, the court instructs you that the plea of the truth thereof, as alleged in the second defense of T. O. S. J. Co., will not be completely made out; or, in other words, in such case, the defendant will fail to justify. But, the court instructs you that even though T. O. S. J. Co. has not made out by its proof the truth of all the defamatory charges in said article, if it has made out by proof the truth of any part of such defamatory charges, to that extent such proof is admissible and competent, in your consideration of this case, in mitigation or reduction of damages to be awarded the plaintiff.¹

¹ Jones v. Ohio State Journal Co., Franklin county. Rogers, J. Affirmed, by Cir. Ct

Sec. 1954. Innuendo—Meaning ascribed thereby, for the jury.

Some of the alleged libelous matters pleaded in the plaintiff's petition are set forth under what are termed in law, innuendoes. The innuendoes, so called, are in parentheses, and usually begin with the words "meaning thereby," etc., and on your examination of the petition you will readily observe the matters to which the court refers. An innuendo is a clause inserted in the petition containing an averment which is explanatory of the preceding words or statements. It is the office of the innuendo to define the defamatory meaning which the plaintiff sets on the words, to show how they come to have that meaning, and also

to show how they relate to the plaintiff, whenever that is not clear on the face of them. The court instructs you that whether the meaning of the defendants, or any of them, who are found by you to have published said matter, by the language used, was what the several innuendoes aver it to be, is a question of fact for the jury, that is, whether such meaning was intended by the defendants. This question of fact, however, so submitted to you, namely, whether the meaning ascribed to the language by the several innuendoes averred in the petition, was the meaning intended by the defendants, or any of them, is to be considered by you only on the question of damages, as a matter of excuse in mitigation of punitive damages, and not as a defense that will prevent a recovery, if you determine that the defendants, or any of them, published the alleged matter in question of and concerning the plaintiff, and if you further find that T. O. S. J. Co., if it published said matter, has not proved the truth of such matter. That is, you have the right to determine whether or not the meaning which the plaintiff ascribes to the words and statements, in the several innuendoes, was the meaning which the defendants intended. But such meaning which you may find the defendants intended, from the evidence, can only be used to mitigate the damages, if any, and not to aggravate or increase them.¹

¹ Jones v. Ohio State Journal Co., Franklin county. Rogers, J. Affirmed, by Cir. Ct.

Sec. 1955. Proof of financial condition of defendants.

Evidence has been offered by the plaintiff tending to prove the financial condition of some of the defendants, both at the time of the alleged publication and at the present time. Now, the purpose of this evidence, so far as it tends to prove the defendants' wealth, or any of them, at the time of the publication, is to make proof of the influence which a publication by a person of wealth will probably have in a community and the consequent extent of the injury which a publication by a wealthy person may probably produce. You will consider this evidence, therefore, only for this purpose, and no other. The purpose of the evidence introduced tending to prove the defendants' wealth,

or any of them, at the present time, is a circumstance to be considered by you in the matter of awarding punitive damages, if any, as against any of said defendants concerning whom the evidence has been introduced as to their wealth, if you find that they, or any of them, are liable to the plaintiffs; as wealthy persons might slander others with impunity and pay the compensatory damages that might be awarded, and such payment would not deter this slanderous conduct. You will, therefore, consider such evidence only for the purpose of awarding punitive damages against the defendants, or any of them, whom you may find liable to the plaintiff, if the evidence justifies your awarding such punitive damages.¹

¹ Jones v. Ohio State Journal Co., Franklin county. Rogers, J. Affirmed, by Cir. Ct.

**Sec. 1956. Good faith of defendants in making publication—
To rebut malice.**

The defendants claim that in making the publication in question, they acted in good faith, after careful examination of the facts and circumstances on which they claim the newspaper article was founded, and that they believed the truth of the article so published, and in support of such claim evidence has been introduced of common and general rumors in the community prior to the article in question, and of publications in other newspapers, and of other facts and circumstances tending to show that they used care and caution before making the publication, in the way of investigations and the like. Now, the court instructs you that this evidence introduced by the defendants is admissible, not to prove the truth of the matters and things about which the testimony has been given, but to rebut any actual malice on the part of the defendants, and to mitigate punitive damages. The court instructs you that such evidence is not admissible, and must not be considered by you, for the purpose of mitigating compensatory damages, but only, as just indicated, of mitigating punitive damages, if any, which you may see fit to award; for defendants can not reduce compensatory damages by proof of mitigating circumstances, except such as in their nature bear upon the question of the extent of

the injury actually sustained. The court, however, instructs you that all those facts and circumstances introduced in evidence by the defendants, and tending to prove the truth of the alleged defamatory charges, the truth of which is set up in the second defense of T. O. S. J. Co., if the truth is not made out, may be considered by you in mitigation of compensatory damages against the defendants, or any of them, whom you may find are liable to the plaintiff.¹

¹ Jones v. Ohio State Journal Co., Franklin county. Rogers, J. Affirmed, by Cir. Ct.

Sec. 1957. Malice in law—Malice in fact.

If you find for the plaintiff, against one or more or all the defendants, the next question for your consideration is that of awarding damages. In this connection, the court desires to instruct you with regard to the two kinds of malice that may enter into a libel, sometimes called implied malice, and malice in fact, sometimes called express malice. Malice in law, or implied malice, is presumed from the publication of the article in question, but this does not mean that the publisher or publishers had actual ill will, hatred or revenge against the plaintiff. It only means that from the character of the publication itself the law presumes that it was made without legal justification or excuse, that is, that it was maliciously done.

Malice in fact, or actual malice, is held to mean personal hatred or ill will or revenge towards another, or a wanton and reckless disregard of the rights of another, or a desire or actual intention to injure another, while malice in law may exist in connection with an honest and laudable purpose.

To malice in law, or implied from the defamatory character of the publication itself, there may be superadded by proof express malice, to increase the damages.

The plaintiff claims that the defendants published the libelous matter in question, not only with implied malice, but also with actual malice towards the plaintiff, and evidence has been adduced on the part of the plaintiff tending to make proof of the existence of actual malice. Among other evidence on this

subject, other publications in T. O. S. J. subsequent to the alleged libel relied on in the petition, have been introduced in evidence, which plaintiff claims are of a like tenor to the publication set forth in the petition.

Now, the court instructs you that these subsequent publications and their introduction in evidence, so far as they are competent for the plaintiff, are admissible only for the purpose of reflecting upon the question of actual malice, if any, on the part of the defendants, or any of them, in publishing the alleged libelous matter mentioned and relied on in the petition as a ground of recovery. The court cautions you that such subsequent publications can not be considered by you as a basis for giving independent damages, or as a foundation of a recovery in and of themselves, nor to increase the damages further than as they affect the degree of actual malice, if any, with which the libelous matter as set forth in the petition and relied on as a ground of recovery, was published.¹

¹ Jones v. Ohio State Journal Co., Franklin county. Rogers, J. Affirmed, by Cir. Ct.

Sec. 1958. Damages—Compensatory and punitive.

The court instructs you that the damages which you may award, if the evidence justifies, are of two kinds, namely; compensatory, and exemplary or punitive damages.

The object of the law in allowing compensatory damages as to make the plaintiff whole, that is, to compensate him for the actual injury which he has sustained to his character and reputation by reason of the alleged defamatory publication.

Exemplary or punitive damages are such as may be awarded in case actual malice is proved. Such damages are assessed, if at all, on the ground of public policy, and not because the plaintiff has any right to the smart money, as it is often called. But the object of the law, as the term implies, is to punish the wrongdoer in dollars and cents, and to give a warning to prevent the repetition of the wrong or a similar wrong to others, and the amount of such exemplary damages, if any, is left to your judgment.

The court instructs you that in awarding compensatory damages, you may take into consideration, as a part of such

damages, reasonable counsel fees of the plaintiff in prosecuting his action, whether there are mitigating circumstances or not; and in awarding damages, whether compensatory and punitive, or compensatory alone, the amount thereof is not to exceed \$——.

As heretofore stated, the publication in question being libelous *per se*, compensatory damages are presumed from the publication itself. It is true that there is no arithmetical standard for computing these damages. Character has no price in the market, as property has, by which the damages can be measured. It may not be easy to say what the damages are, but that does not relieve the jury from ascertaining and declaring what they are, if the injury has resulted to the plaintiff. Of course, it is not the idea of libel suits that the plaintiff is to make money or to speculate upon his reputation. Much, therefore, is left to your sound judgment and discretion in the matter of awarding damages. It is for you to say how much the plaintiff's reputation has been damaged, if at all. In estimating compensatory damages, it is your duty to take into consideration those mitigating circumstances, if any have been proved, which in their nature bear upon the question of the extent of the injury actually sustained. And, if the libelous publication was not made with actual malice, personal ill will, hatred, or some such feeling, you can only allow compensatory damages. But, if the defamatory publication was made with actual malice, then you may superadd exemplary damages to the compensatory damages awarded, in such amount as in your judgment the case deserves.

In that connection, the court instructs you that if you determine that one or more of the defendants published the article, or caused it to be published, but without actual malice, and that others published the article with actual malice, you will by your verdict allow a recovery of an amount against all whom you find liable, as compensatory damages and a further amount against one or more, as exemplary damages, whom you may find published said article with actual malice, and liable to the plaintiff.

If you determine that those defendants whom you find liable, if at all, published said article without actual malice, you will award compensatory damages only.

If you determine that all those defendants whom you find liable, if at all, published said article with actual malice, you may add to the compensatory damages, punitive damages against all such as above indicated.

If you find for the defendants, or any of them, you will say so in your verdict.

Upon retiring to your room you will select one of your number foreman, and upon arriving at a verdict your foreman will sign the same and you return with it into court.¹

¹ *Jones v. The Ohio State Journal Co., et al.* Court of Com. Pleas, Franklin Co., O. Rogers, J. Affirmed, by Cir. Ct.

Sec. 1959. Publishing information received from others—Liability therefor.

A person receiving information from others, which if true would be injurious to the character or reputation of another, is not justified in publishing that information to the prejudice of that other person merely because he believes it to be true; he must not only have good reason to believe it to be true, but he must have published it from justifiable motives, and if it turns out to be untrue, and he acted without due diligence, and another is injured thereby, he can not therefore escape liability.

There is no legal immunity in favor of anyone repeating libelous matter. He who republishes such matter takes the risk of its untruthfulness and liability for what injury it may cause.¹

¹ *Voris, J., in Carrier v. Findley*, Summit Co. Com. Pleas; *Cooley on Torts*, 259 (* 220). Giving with the publication the name of the author is no protection. *Haines v. Welling*, 7 O. 253; *Fowler v. Chichester*, 26 O. S. 9; *Dole v. Lyon*, 10 Johns. 447.

Sec. 1960. Publication made to whom.

To constitute a libel, publication must be made to a person or persons other than the person against whom the libelous words are published.

It would not be libelous for the defendant to send to the plaintiff a communication which would be libelous if sent to a person other than the plaintiff.¹

¹ Nye, J., in *Stevens v. McBride*, Summit Co. Com. Pleas.

Sec. 1961. Slander—Defamatory words must be spoken to some person.

In legal contemplation, defamatory words do not constitute slander, unless they are spoken to some person or persons other than the individual concerning whom they are uttered. To say to one's face any derogatory or evil thing respecting him is no defamation, nor is it a publication in a legal sense to speak slanderous words to a person in a public place, and in the presence of or near to other people, if in fact the words thus spoken are not heard or understood by anyone excepting the individual to whom they are addressed.

If, therefore, you should find from the evidence that the defendant in this case did use the language imputed to him by plaintiff, and that he uttered the same in the presence of the plaintiff and various other persons, but you further find that the words so spoken by him were not heard or understood by any one excepting the plaintiff, to whom they were addressed, then you are instructed as a matter of law that the acting of the defendant in so using said words was not slander, and the plaintiff can not recover, and your verdict should be for the defendant.¹

¹ D. F. Pugh, J. *Lennon v. Rice*, Franklin Co. Com. Pleas.

Sec. 1962. Words when to impute a crime.

To entitle the plaintiff to a verdict it must appear that the words which the defendant spoke imputed to the plaintiff the commission of some crime. If the defendant accused the plaintiff of being a thief, or charged her of having stolen property of his, these words did charge the commission of a crime if there were no qualifying or modifying words used at the same

time and in connection with the terms "thief," or "steal," or "stole," because stealing—larceny—is an indictable offense. But if the accusation is or was that the latter took money or any other property of the former, it does not impute a crime, unless other language is used to expand its meaning that far. That is, if you should find from the evidence that the defendant did not use the word "thief," or did not charge the plaintiff with having stolen the property or having committed a theft, but simply used language that she took the property, then such words would not in and of themselves constitute slanderous words, unless other words were used in connection with them to expand them so as to mean that he charged her with a crime.¹

¹ Pugh, J. *Lennon v. Rice*, Franklin Co. Com. Pleas.

Sec. 1963. Libel—Charge of altering certificate—Meaning of words for jury.

We can not say as a matter of law that the charge of altering the certificate, contained in the alleged article, is criminal, there being no published declaration that it was done with the intent to defraud, and no *innuendo* in the amended petition charging that intent. But we leave it to you to say, as a matter of fact, from the evidence, whether its effect was, or was not, to render the plaintiff contemptible in public estimation, or to injure his good name; whether or not the natural and ordinary effect would be to prevent him from engaging in his profession as a teacher, or be injurious to his feelings.

Among other things, R. S., sec. 13083, defines forgery as: "Whoever falsely alters any certificate authorized by the laws of this state with the intent to defraud is guilty of forgery."¹

¹ Voris, J., in *Carrier v. Findley*, Summit Co. Com. Pleas.

Sec. 1964. Privileged communications—Whether extended to member of examining school board.

As to the privilege of the members of the examining board, I will say to you that a member of the board of county examiners

is a public officer who performs duties of the highest order. The law makes it obligatory on him to make an intelligent, honest, and thorough examination into the qualifications of every individual who teaches in the public schools of the county. The statute is emphatic on this point. No one can become such a teacher "until he or she has obtained from the board of examiners a certificate of good moral character, and that he or she is qualified to teach orthography, reading, writing, arithmetic, geography, English grammar, and the history of the United States, and possesses an adequate knowledge of the theory and practice of teaching, and, if required to teach other branches, that he or she has the requisite qualifications; provided that after January 1, 1889, no person shall be employed as a teacher in any common school who has not obtained from such a board a certificate that he is qualified to teach physiology and hygiene, and further if at any time the recipient of the certificate be found intemperate, immoral, incompetent, or negligent, the examiners, or any two of them, may revoke the certificate. * * * And when any recipient is charged with intemperance or other immorality, the examining board shall have power to send for and examine witnesses under oath."¹

The power so conferred, and the duties so imposed, create the right to make the most searching inquiry into the conduct, manners, qualifications, morals, intellectual potency of all persons holding certificates, or applying for one. This official discretion should be exercised with sincere, intelligent, and courageous fidelity, and every such teacher or applicant enters as a candidate or upon his public duties as teacher upon the express understanding that his whole conduct, in the respects enumerated, is open to the scrutiny of the examiners and to the fair criticism of the newspaper press.

To this end the communications and actions of the examining board in the legitimate discharge of their duties, exercised in good faith and reasonably, are privileged and should be fully protected. So any inquiries or communications made by a

¹ Code, sec. 7829.

member of a school board in the honest and faithful discharge of his duties, to enable him to act advisably in respect to the qualifications of the plaintiff as a teacher, and in respect to the certificate he held, or in respect to an expected examination for certificate, should be fully protected, unless he went beyond the domain of reasonable official conduct. And this protection should extend in this case to communications made to the state board of examiners.

You are also instructed that if he found a teacher teaching in the public schools without a certificate, that it would be proper for him to call the attention of the board of education of the proper township to that effect. But it was no part of his official duty to publish in the newspapers of and concerning the plaintiff, any matter or thing implying praise or demerit, or respecting teachers or applicants for certificates. If he does so he does it at his peril, as if he sustained no official relation to the public. His acts in that respect would be determined from the same standard as that applied to any unofficial person. In this respect he stands on the same footing, and incurs the same liability, that private persons do, but in the legitimate discharge of his official duties, exercised in good faith and upon reasonable grounds, his communications are privileged.

A teacher or a candidate for examination as such, comes before the board of examiners with his habits and associations, mental and moral qualifications, in fact his whole character open for their careful, intelligent scrutiny; the board could not discharge its official duties unless the door was open to them to enter upon a careful, and, where character is called in question, a searching inquiry as to the qualifications of the teacher or candidate. To this end, not only must freedom of inquiry, discretion, and communication be had as to all reasonable means of information, but there must be exemption afterwards from liability for words written or spoken in good faith and in the honest belief of the truth, the making of which, if true, will be justified by the occasion, though it should turn out that it was untrue. All that the law requires in such cases is that the

officers should act in good faith and reasonably under the circumstances.²

² Voris, J., in *Carrier v. Findley, et al.* As to privileged cases, see *Cooley on Torts*, 246 (210).

Sec. 1965. Libel—Reports of judicial proceedings—Privilege.

You are instructed that a full, fair, and impartial report of the judicial trial had in open court, where the parties interested have an opportunity of ascertaining and vindicating their rights, may be published with impunity, providing that they are unaccompanied by malicious, defamatory comment. Reports of judicial proceedings in the absence of express malice, if fair, true, and accurate, and nothing more, are privileged; but as soon as any attempt is made at comment, or misstating the truth, the privilege is lost. * * *

The publication complained of in the plaintiff's petition purports to be a report of the utterances of the judge of the court made in connection with, and as a part of, the judicial opinion delivered in the case then pending in court, wherein this plaintiff was plaintiff, and P. D. was defendant. Such matter, if fairly and truthfully reported and published, is privileged, provided it was done without malice and fairly stated what the court said on that subject. The defendants had the right to publish as part of the proceedings of the trial what the court said in delivering its opinion and deciding the case, provided it was done fairly and truthfully and without malice.

The burden is upon the plaintiff to show by a preponderance of the evidence that the alleged libelous matter contained in the publication is false. It must appear from the evidence that the court, in passing and delivering its opinion in the case of D. v. D., did not express the opinion attributed to it in the publication complained of, or that it did not fairly and truthfully report the case, or what the court said in delivering its opinion, before the defendant can be held liable.

The fact that this publication was a report made through a correspondent, and the claim that the correspondent procured

the statement from another person, in no manner lessens the wrong of the defendant for the words which are libelous, malicious, and untrue.¹

¹ Gillmer, J., in *Doyle v. Scripps Pub. Co.*, Trumbull Co. Com. Pleas. As to privileged communications, see charge in 10 O. S. 549; Cooley on Torts, 246 (210) *et seq.* Where the answer claims the publication to be privileged, and issue is joined thereon, whether or not the same is privileged is for the jury under proper instructions. *Post Pub. Co. v. Moloney*, 50 O. S. 71. Whether the facts which render the publication privileged are established by the evidence is a question for the jury. *Id.* 85.

Sec. 1966. Libel—Publication from report of examining committee of county treasurer.

If you find that the extracts so published were parts of a public record, and you should also find that the same were published from good motives and for justifiable ends, the defendant would have the right to publish the same and the law would protect him in that right; and in determining the motives of the defendant, you should consider all the evidence before you, including the report itself, which is in evidence, and, if there were portions of this report which were exculpatory in their character, and these were omitted by the defendant in the publication, you may consider this omission in determining the motive which prompted the defendant in making the publications of the extracts so published by him. * * * The defendant urges that the matters complained of were based upon these extracts, and were fair and proper comments thereon. This is denied by the plaintiff, and this brings you to the consideration of the language complained of in the petition. If you have found that the extracts referred to were parts of a public record, and were published in the manner and for the purposes stated, then as a matter of law the defendant would have the right to make any fair and proper comments upon the extracts so published, and which would be fairly warranted by giving to the language embodied in the extracts its fair and natural import, signification, and meaning; but he would have no right to go

beyond that and give to the report by his comments a meaning and signification not warranted by the language used in the report. And if in such a publication of such comments in the report he so distorted the language thereof, or the natural import and meaning of that report, and the language used therein, in such manner as to wrongfully impute to the plaintiff malfeasance in office, or charged him with having unlawfully or wrongfully appropriated to his own use the money of the county whilst he was in office, or with having conspired with others so to do, and that the same was false, and you so find from the evidence, then the publication would be libelous and the plaintiff would be entitled to recover.¹

¹ Johnston, J., in *McMaster v. Caldwell*.

Sec. 1967. Comments upon report made with good motives, etc.

But if the defendant, in publishing comments upon extracts from the report, acted from good motives and for justifiable ends, and his comments thereon were fairly warranted by the language of the report, then the defendant would be justified in so publishing such comments, and the plaintiff would not be entitled to recover in this action. * * * To show that defendant published such comments for justifiable ends he must satisfy you from a preponderance of the evidence that the same was published by him in good faith, for the purpose of protecting the interests of society and to produce purity in public affairs, or some other kindred purpose, whereby the general welfare of the community was to be promoted, and if you are so satisfied, then this would establish the fact that the same was done from good motives, and this would constitute a defense to this action.¹

¹ J. R. Johnston, J., in *McMaster v. Caldwell*.

Sec. 1968. Statements made to officer in discovering crime, privileged.

Statements or inquiries made to an officer of the law or to others for the purpose of discovering a crime or of bringing a guilty person to justice are privileged and do not constitute

slander, provided they are made on reasonable grounds, in good faith, honesty, and without malice, even though in fact they may be false and unfounded. You are, therefore, instructed, gentlemen, that you can not in your deliberations, for the purpose of establishing the plaintiff's charge of slander against the defendant, consider any statement or statements made by the defendant to the police officers for the purpose of securing an officer with respect to his suspicions that plaintiff had stolen or taken from his residence linen or other articles of value, provided such statements were made without malice, and in an honest belief in their verity, and were also made for the purpose of securing the assistance of the officer with a view to the promotion of justice.¹

¹ Pugh, J. Lennon v. Rice, Franklin Co. Com. Pleas.

Sec. 1969. Construction of words and understanding of meaning by hearers.

All of the words which it is charged the defendant uttered, having been spoken in one conversation at one time and place, they must be construed and interpreted together, and in connection with the surrounding circumstances. To constitute slander, the words used so taken and construed and in connection with the surrounding circumstances must have been understood by a third person or persons who heard them, if there were such persons, in the evil sense which the law requires; that is, as imputing the commission of a crime. *Prima facie*, they will be "presumed to have been understood according to their common import, and as they would naturally impress the minds of the hearers or as the defendant meant them." It is a question whether the words used by the defendant, even if they were thus set out in the petition or their equivalent, are not ambiguous. If they are of doubtful meaning, and do not fairly and reasonably, when taken and construed together, imply that the plaintiff was a thief, or had stolen the property, it can not be said that they were slanderous.¹

¹ Pugh, J. Lennon v. Rice, Franklin, Co. Com. Pleas.

Sec. 1970. Effect of adding excusable words.

If the words uttered by the defendant meant that the plaintiff committed an indictable offense, and that the plaintiff added to these words that the plaintiff was irresponsible mentally, or insane, or words to that effect, these words taken all together do not constitute slander; if you find that to be the signification of all the words which were used by the defendant, then you are instructed that they charge merely an offense which was excusable. To charge a person with such an excusable offense is not actionable as slander.¹

If the charge of a crime was not qualified or modified by other words used in connection therewith, they were slanderous and imputed a crime of a serious nature. If that was their import, they were calculated to cause great injury to the feelings and reputation of the plaintiff. Indeed the law deems language which imports such a crime when spoken in the hearing of a third person, or persons, as defamatory, as actionable in itself, and it will presume as the court and jury must presume, without any proof, that the plaintiff's reputation was thereby impaired.²

¹ The court said in this connection that he was in doubt as to whether or not the court or jury should pass on the meaning of the words set forth in the petition or proof, but finally committed the matter to the jury.

² Pugh, J., in *Lennon v. Rice*, Franklin Co. Com. Pleas.

Sec. 1971. Libel—Meaning of words for jury.

It will be necessary for you to determine from the letters themselves whether the words and language used therein, imputing to the plaintiff that he has been guilty of any crime, fraud, dishonesty, or dishonorable conduct, or which have a tendency to injure him in his office, profession, calling, or trade. If you find from the evidence that the language used in said letters, or either of them, is such as to fairly and properly charge or impute to said plaintiff that he has been guilty of any crime, fraud, dishonest, or dishonorable conduct, or which have a tendency to injure him in his office, profession, or calling,

then they are libelous. Whether or not the language complained of as libelous will bear the meaning ascribed to it by the *innuendo*, whether such was the meaning intended, is a question of fact for the jury.¹

¹ Nye, J. *Stevens v. McBride*, Summit Co. Com. Pleas. Whether language will bear the meaning claimed in the innuendo is a question for the Court, and whether that meaning was intended is for the jury. *State v. Smiley*, 37 O. S. 30; *Boyle v. State*, 6 O. C. C. 163; *Gohen v. Cincinnati Volksblatt*, 31 W. L. B. 111; *Dougherty v. Miller*, W. 36; *Getchell v. Tailor's Exchange*, 26 W. L. B. 233.

Sec. 1972. Libel—Meaning of words.

It is for the jury to determine from the testimony the meaning of the words which are charged to have been published of the plaintiff; and in determining their meaning, you should construe them in their plain and ordinary sense, and take them to mean what persons of ordinary intelligence would take them to mean.¹ Having thus determined their meaning, you should then say, was that meaning such as was reasonably calculated to injure the plaintiff's reputation, or expose him to ridicule, distrust, contempt, or hatred.²

¹ *Cassidy v. Brooklyn Daily Eagle*, 138 N. Y. 239.

² *Wright, J., in Horton v. Enquirer Company.*

Sec. 1973. Kinds of malice in slander.

There are two kinds of malice that may enter into a slander case. They are malice in law, sometimes called imputed or legal malice, and actual malice. Legal malice does not mean that the defendant had actual ill-will, or hatred, or a feeling of revenge, or an unfriendly feeling against the plaintiff. If the slanderous words were spoken voluntarily and without legal excuse, they were, in the eye of the law, spoken maliciously. The law presumes a wrongful intention—malice—when the words are shown to have been uttered without justification.

Legal malice may be presumed without direct proof. Without evidence legal malice is inferred when the slanderous words

were not spoken on a justifiable occasion. If the words were spoken on a justifiable action, for instance, to an officer or others for the purpose of ascertaining about a supposed crime, if there was a legal excuse for speaking them, legal malice can not be inferred.

Actual malice signifies actual ill-will, hatred, revenge, jealousy, and the like. This kind of malice must be proved as any other fact is, by evidence. The law does not presume it, and the jury can not infer it without evidence to warrant such an inference.

To entitle the plaintiff to recover compensatory damages, it is not necessary that she should prove that the defendant was actuated by actual malice in speaking slanderous words.¹

¹ Pugh, J., in *Lennon v. Rice*, Franklin Co. Com. Pleas.

Sec. 1974. Damages—Kinds of.

The question of damages will have to be considered by you in case you find for the plaintiff upon all the issues. There are two kinds of damages—compensatory and exemplary or positive damages. The object of the law in allowing the first kind of damages is to make the plaintiff whole for outraged feeling and for the injury to his character or reputation, whereby he was compelled to appear in one of the tribunals of his country and vindicate his character against aspersions upon him. If the evidence discloses that the defendant spoke the words set out in the petition, or words substantially like them in meaning, that he spoke them in the hearing of a third person, or persons, that he uttered them maliciously, in the sense of legal malice, and if you find that there are no mitigating circumstances, then he is entitled to such compensatory damages as in your judgment will make him whole for the injury to his reputation, and for outraged feelings, and including also a reasonable attorney's fee for prosecuting this suit.

It is true that there is no arithmetical standard for computing these damages. Character has no price in the market as property has, by which the damages can be measured. It

may not be easy to say what the damages are, but that does not relieve the jury from ascertaining and declaring what they are if the injury has been to the plaintiff. Of course it is not the idea of slander suits that the plaintiff is to make money or to speculate upon his reputation. Much is left to your sound judgment and discretion acting upon the evidence, and there is nothing that the court can say that will aid you. It is for you to say how much the plaintiff's reputation has been damaged. In estimating the damages it is your duty to take into consideration mitigating circumstances, if any have been proved. If the words were not spoken with actual malice, personal ill-will, hatred, or some such feeling, you can only allow compensatory damages. But if you find that the alleged slanderous words were uttered with actual malice, then you may add exemplary damages. The whole are assessed, if at all, on the ground of public policy, and not because the plaintiff has any right to the smart money, as it is often called. The object of the law, as the term implies, is to punish the wrong-doer in dollars and cents, and to give a warning to prevent a repetition of the wrong or a similar wrong by others. The amount is left to your judgment.¹

¹From *Lennon v. Rice*, Franklin Co. Com. Pleas. Pugh, J. Compensatory damages cover injury to feelings, loss of business, expenses in vindicating character, 1 Disney, 482; mental suffering from loss of reputation, 21 W. L. B. 292.

Sec. 1975. Damages in libel per se—When testimony rebuts legal malice.

The only question, therefore, gentlemen of the jury, to be submitted to and determined by you is the amount of damages to be assessed against the defendants for the libel. The evidence offered here which tends to show actual malice on the part of J. C. J., who was the editor, and wrote the article, can not in law be considered as against the other defendants, or any of them. The uncontradicted testimony of the defendants, conclusively shows that they entertained no actual ill-will or malice

toward the plaintiff. This rebuts the legal malice which is presumed to follow from the libel complained of, because of its being libelous *per se*.

The plaintiff is entitled to the verdict of the jury in this case for compensatory damages only. The article being libelous *per se*, the law presumes that the plaintiff has suffered damages from the publication thereof, without proof of any actual damage by him suffered.

It has been stated to you, gentlemen, in argument, that no proof has been made of any actual injury, by loss of any friends, or that he was discharged from the army. You must not be misled by such argument, because, as I have stated to you, the plaintiff is entitled to damages without proof of any actual damage. By this is meant that because of this libelous article the plaintiff has been damaged in his reputation in a way which can not be measured in dollars and cents as property can be measured.

The jury are therefore, as I have already stated, instructed and required to render a verdict in favor of the plaintiff, and against the defendants whom I have named, and you will assess such damages as in your best judgment you deem proper and right, taking into consideration all the facts and circumstances as developed by the evidence. The amount, that shall be awarded to the plaintiff is committed to the sound discretion of the jury.

The court can only direct the jury as to the elements of damages which may be legally considered: First. The jury should consider the age of the plaintiff; his family, and social relations. Second. You should consider his occupation and his official position, taking into consideration the effect of the libelous article had upon him in that capacity. Third. You should consider the question of whether or not the plaintiff suffered mental anguish or distress. Fourth. You are required by law to include in your verdict reasonable attorneys' fees to compensate him for the expense incurred in the prosecution of this case. In determining the amount included in your verdict by way of attorneys' fees, you will take into account the labor

incurred and the amount of time spent in the trial. You may also in assessing the damages consider the standing of the defendants; not for the purpose of enhancing the damages because of any wealth that they may have had, but you may only consider that by way of determining the weight of their opinion, as reflecting upon the damages that the plaintiff may have suffered. The aim and purpose of awarding compensatory damages is to merely compensate the injury, and not to enrich the party. Your verdict should not be influenced in the slightest degree by any feelings of prejudice against or in favor of any of the parties in this action by reason of any work in which they are engaged. Settle this matter fairly and honestly, as your conscience impels you, to do right, so that the scales of justice may evenly balance.¹

¹ *Reeve v. Wheeler, et al.*, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 1976. Libel—Counsel fees allowed in compensatory damages.

“If the defendants published a paper in manner and form as alleged, and injury resulted to the plaintiff from and by reason of such publications, he will be entitled to recover such damages as he has directly sustained; and in estimating compensatory damages the jury may take into consideration and include reasonable fees of counsel employed by the plaintiff in the prosecution of his action. If the publication was made with a bad motive or wicked intention, the jury may go beyond mere compensation and award vindictive, or punitive damages—that is, damages by way of punishment.”¹

¹ From *Finney v. Smith*, 31 O. S. 529. Costs in clearing up the charge may be included, W. 316; 1 *Disney*, 482.

Sec. 1977. Extent to which libel is published as affecting damages.

The extent to which a libel is published may affect the amount of damages for injury done. If the libel is published to a large number of persons, and in a public place, that would have a

tendency to cause a person against whom the libel is published more injury than if published to a single person and in a private house.¹

¹ Nye, J., in *Stevens v. McBride*, Summit Co. Com. Pleas.

Sec. 1978. What constitutes libel to one in his business.

A libel consists in the abuse of that constitutional right by maliciously writing or printing, of and concerning another, any language or representation which is false and the natural tendency and effect of which are to injure such other person, as in this case, in his business standing and reputation in the community where he lives and is known, or in his trade or business, and hold him up to ridicule or contempt, or in any way to lessen him in public esteem.

It will be your duty to take the article submitted in evidence, read it carefully as a whole and in detail, and decide as men of judgment and experience whether, as contended by the plaintiff, it had such a tendency and effect, or any of them, so far as the business reputation of the plaintiff or his calling or his trade are concerned, or whether, on the other hand, as claimed by the defendant, it can not be fairly said to have had such tendencies or effect, or any of them.

If in your judgment the publication of the article had no such tendencies or effect as have been mentioned, it will be your duty to return a verdict for the defendant without proceeding further in the case.

If, however, by reason of the publication of the article, you should find that the plaintiff was injured in his reputation and trade, and has suffered a diminution of his business as a retail clothier, and has been otherwise injured in his business reputation, then your verdict must be for the plaintiff, because it is a presumption of law that anything stated in such publication which is derogatory to the business reputation and trade of the plaintiff as alleged is false, and the law further presumes that the defendant, in publishing the same, intended to cause what-

ever injury naturally would and did result from such publication.¹

¹ From Cincinnati Times-Star Co. v. Kahn. Judgment affirmed (in favor of Kahn), 52 O. S. 662.

Sec. 1979. Measure of damages to one in his business.

It will be your duty next to consider whether your verdict, if for the plaintiff, shall be for nominal or for substantial damages. In this connection it will be necessary to determine whether, under all the circumstances disclosed by the evidence, the plaintiff has suffered a real and substantial injury to his trade or business reputation, or whether he has suffered only what is termed in law as a nominal injury. Nominal damages may be presumed from the publication of libelous matter, but the question of the amount of such nominal damages must be left to the good judgment of the jury to be exercised upon all the evidence. The amount awarded for nominal damages must rest in the sound discretion of the jury and may not exceed one cent.

The plaintiff contends that he has been greatly injured in his business reputation, and has lost a large number of customers, and has suffered a diminution of his business to a great extent and has been otherwise injured in his reputation. If you find that the plaintiff has in fact not suffered any real or substantial injury in these respects, he is entitled to nominal damages only to vindicate his right.

If the plaintiff suffered real or substantial injuries, as alleged, then he is entitled to receive such a sum as in your judgment would fairly compensate him for such loss. It may be regarded as settled in this state that in actions of tort involving malice, fraud, insult, or oppression, the jury may, in estimating compensatory damages, take into consideration the reasonable counsel fee of the plaintiff in prosecuting this action for the redress of his injuries against the wrong-doer, even when there are mitigating circumstances not amounting to a justification.¹

¹ From Cincinnati Times-Star Co. v. Kahn. Judgment affirmed (in favor of Kahn), 52 O. S. 662.

Sec. 1980. Same, continued—Character and extent of business, and business reputation to be considered.

In order that you may pass intelligently upon this question of damages, if any damages are to be awarded, it will be proper for you to consider the character and extent of the business in which the plaintiff was engaged, as well as his previous reputation in such trade or business. The extent of an injury to one in his trade or business, or in his reputation in relation to such trade or business, must depend partly on the nature of the publication itself and partly on the character and extent of his business or trade. For instance, a man's reputation in business may be so good as to be firmly established in public confidence so that it can not well be injured by any such publication as that of which the plaintiff complains; or it may be so bad as to be incapable of serious injury therefrom; or, while good, yet not so firmly established in public esteem as to prevent injury resulting to it. The law presumes every man's reputation as a tradesman to be good until the contrary is made to appear. The testimony on that subject must be carefully weighed and considered. If you find the publication a libel, as the term has been defined, it will be left to you after all to say to what extent, under all the circumstances and evidence, his reputation in business has been damaged thereby, and to what extent he has been damaged in his trade and business, subject only to the propositions of law which have been suggested by the court.

A man's known reputation in the community, or general estimation in which he is held in the business community where he lives and moves and is known, while it is the resultant of the opinion of all, it is not the individual opinion of any particular person or persons. You will decide what the known reputation of the plaintiff was at the time of this publication, for in view of all the evidence you are limited to his business reputation, and you can not go into particular acts.¹

¹ From *Cincinnati Times-Star Co. v. Kahn*. Judgment affirmed, 52 O. S. 662.

**Sec. 1981. Same, continued—Effect of absence of malice—
Mitigating circumstances—Effect of acting
upon fairly reliable information.**

There is no way of reaching a correct conclusion in cases like the one on trial except through the good judgment of the jury. The law, therefore, permits the jury to take such a view of all the facts and circumstances properly in evidence in the assessment of damages and as may appear fairly from the preponderance of the evidence. It may appear to you that the publication complained of was made only with such malice as the law implies from the mere doing of a wrongful act, which is recognized in the law as "implied malice;" or with an actual evil intent or express purpose to injure; or that it was not only false, but known to be so by the defendant at the time of the publication itself, or wantonly made without inquiry or information upon which the defendant was fairly justified in relying; or that there was nothing in the character, conduct, or position of the plaintiff to palliate or excuse such publication. It may appear to you, on the contrary, that while the defendant may not convince you that he should escape the actual consequences of the alleged libelous matter, if wrongful in fact, yet there was no actual malice on the part of the defendant, no real or conscious intent to injure, no bad motive; that though in fact false, the defendant in making the publication acted upon information on which he was fairly justified in relying; that there was more or less truth, or a greater or less approach to the truth in this publication, or that there was something in the business reputation of the defendant, or in the methods of doing business, or in the character of the business itself, or in any reports which may have existed in police circles, or in the letter as introduced in evidence—any such information may have reached the defendant prior to the publication itself—to palliate in a greater or less degree, or excuse in a greater or less measure, the publication itself.

In case you find all or any of the circumstances last mentioned to have existed, while they do not make out a complete defense

to entitle the defendant to a verdict, if you first find the publication in fact to be libelous, they are yet matters which you have a like discretion to consider and diminish your assessment of damages accordingly, in case you award damages to this plaintiff at all. These, in legal definition, are termed mitigating circumstances.

In ascertaining whether there were mitigating circumstances, or whether there were aggravating circumstances, it will be proper for you to consider all the evidence, direct and circumstantial, in order that you may reach a correct conclusion. It is the province of the court to instruct you of the law; it is the province of the jury to analyze and weigh the evidence. It is the province of the court to pass upon the competency of the testimony; it is the province alone of the jury to weigh that testimony.¹

¹ From *Cincinnati Times-Star Co. v. Kahn*. Judgment affirmed, 52 O. S. 662.

Sec. 1982. Measure of damages—Effect of agreement to accept retraction of publication.

The defendant in its amended answer pleads as a second defense that an agreement was entered into by the plaintiff and defendant through counsel. It is a good defense to an action for libel that if, after the publication, the plaintiff agreed with the defendant to accept the publication of an apology in full for his cause of action, and that such an apology had been published. The burden of proof, however, in a defense such as is alleged in the amended answer, is upon the defendant to show that such an agreement was made, and that there was a good consideration for the same, and that it was carried out in good faith, and that the plaintiff so agreed to accept such retraction in full satisfaction of any claim which he may have had by reason of the publication. The evidence on this point must be governed by the proposition of the law as I have indicated it.¹

¹ From *The Cincinnati Times-Star Co. v. Kahn*. Judgments affirmed (in favor of defendant in error), 52 O. S. 662. An offer to retract may be shown in mitigation. Newell, Def. p. 907, 144 N. Y. 144.

Sec. 1983. Slander of candidate for office.

There has been testimony submitted for your consideration tending to prove that whatever the defendant did say of the plaintiff and his business was said of him as a candidate to an elective office, and in commenting on the character of his fitness, abilities, and qualifications for the office for which he was a candidate. A candidate for office puts the character of his fitness, abilities, and qualifications in issue. His conduct and acts, whatever they may be, may be freely commented on and boldly censured, and statements made of a candidate for office in good faith by a voter, when made by one who has a reasonable ground to believe them true, and does so believe them to be true, are privileged, and no recovery can be had, unless the proof clearly shows them to have been maliciously made; but malicious defamatory assaults on his private character, falsely imputing to him crime, can not be justified on the ground of criticism, nor claimed to be privileged. The character and reputation of a person who is a candidate for office is as sacred then as at any other time, and if one without probable cause states what is false and aspersive, he is liable therefor, as falsehood and the absence of probable cause amount in law to proof of malice.

You will therefore carefully examine all the testimony before you, that you may know all the circumstances and conditions under which the words were spoken by the defendant, should you find they were spoken by him, the motive, object, and purpose, if any, he had in speaking them, and if you find such statements to have been made in good faith by him about the plaintiff as a candidate for office, that at the time he so made them he had a reasonable ground to believe them to be true, and did so believe them to be true, then such statements would be privileged and your verdict will be for the defendant.¹

¹ J. L. Greene, J., in *Nichols v. Fenn*, 51 O. S. 588. Judgment affirmed. A newspaper may discuss properly the habits and qualifications of a candidate for office. *Hunt v. Bennett*, 19 N. Y. 173; *State v. Balch*, 31 Kan. 465. It will be liable if it makes a false accusation of crime. *Bronson v. Bruce*, 59 Mich. 467.

Sec. 1984. Libel against one in his business as a bricklayer and contractor—By a bricklayer's union.

It is libelous to falsely and maliciously charge a journeyman bricklayer, who holds himself out as capable of such service and seeking employment, to be an inferior workman, and it is likewise libelous to falsely and maliciously charge one who holds himself out as a bricklaying contractor (capable and seeking such contract work as his occupation and business), as being a contractor who employs inferior bricklayers to do his work and thereby imposes on the owners of buildings for whom he does work as such contractor.

The law presumes the reputation of plaintiffs to be good in respect to their trade or profession, and that they employ men who have the usual, ordinary skill of the trade they are serving in, until the contrary appears in proof.

If you find that the defendants did in fact maliciously issue and distribute this circular, that it is false as to the essential charge, that the plaintiffs employed "inferior labor" and "inferior bricklayers," then the plaintiffs are entitled to recover damages therefor.

The law authorizes you to assume that when one makes a false and libelous charge against another, which tends to do him an injury, he did so in malice.

The defendants have offered proof as to the character of some of the work done by plaintiffs and their men before the issuing and distribution of the circular, which was not admitted to prove the truth of the circular because they did not, by their answer, make issue as to its truth, but it was admitted and is competent and proper to be considered as to the motive, malice, if any, on good faith they had in issuing and distributing the circular. If they honestly knew or had heard of said work, and believed in good faith that it was inferior work, and work caused by plaintiffs employing inferior workmen, then you should consider that fact as in mitigation of damages.

If the jury find for plaintiffs on the proof according to the law as I have stated it, you should give such verdict as will

fairly and justly compensate them for the injury issuing and distribution of such libelous charge reasonably caused them as to their reputation, in respect to their trade and occupation, and for such annoyance and distress of mind as they may have suffered in consequence of such publication.

And if you find there was malice in the purpose and act of the publication, you may also include in the verdict what you estimate as reasonable attorney fees for prosecuting this cause of action.

And if the publication was done in such excessive degree of malice as that, in your judgment, compensatory damages are not a sufficient loss and punishment for the act done, then you may include in your verdict also such sum of money as you consider just to be recovered in the name of the plaintiffs for their benefit, as by way of a punishment of defendants, and to prevent a repetition of like publication.

But, gentlemen of the jury, have a care that your verdict in this respect is just and reasonable, remembering that the law entrusts you with a large discretion in this respect. As punitive damages you can allow nothing, or whatsoever sum you deem just.

On this question as to motive, malice, and the degree of it, consider all the facts in proof, including the original controversy of the parties and the matters between them occurring prior to the publication of this circular.¹

¹ Morris L. Buchwalter, J., in *Bricklayers' Union v. Parker*.

An agreement between a number of persons not to work for a certain manufacturer, with a view to oppress or disable him in his business, or constrain him to submit to rules in its conduct, is unlawful. He has a right to manage his own affairs without interference from others according to his own will and discretion.

The following authorities sustain plaintiff's right to damages for the conspiracy to destroy their business, and to an injunction against a repetition of the wrongs complained of, and show that the trial court committed no error against the defendants below, either in its general charge or refusal of special charges. *Crump v. Commonwealth*, 84 Va. 927; *Baughman v. Richmond Typo. Union*, Va. Law Journal, April 1887; S. C. 24 Central L. J. 289; *Carew v. Rutherford*, 106 Mass. 1; *Walker v. Cronin*, 107 Mass. 555;

Sherry v. Perkins, 147 Mass. 212; *State v. Donaldson*, 32 N. J. Law, 151; *Van Horn v. Van Horn*, 52 N. J. Law, 284; *State v. Stewart*, 59 Vt. 273; *State v. Glidden*, 55 Conn. 46, approved 20 Irish Law Times, 305; *Mapstrick v. Ramge*, 9 Neb. 390; *Brace v. Evans*, 3 Ry. and Corp. L. J. 561; *Old Dominion Steamship Co. v. McKenna*, 30 Fed. Rep. 48; *Emack v. Kane*, 34 Fed. Rep. 47; *Casey v. Typographical Union*, 45 Fed. Rep. 135; *Coeur D'Alene, etc., Min. Co. v. Miner's Union*, 51 Fed. Rep. 260; *Toledo etc., Ry. Co. v. Penna. Co.*, 54 Fed. Rep. 730, 746.

Sec. 1985. Same, continued—Measure of damages.

If the distribution of the various circulars in proof, the various calls of certain of the defendants, and their demands upon the materialmen, were part of a combination by defendants to coerce the plaintiffs into a discharge of their apprentice, their brother, and the other non-union men, and the employment of union men, against their will, or otherwise with the intent to impoverish them and break up their contracting business, and you further find that defendants did threaten the respective materialmen, customers, and patrons of the plaintiffs with injury to their property by loss of a large portion of their trade if they refused to comply with defendants' demand; that such threat or threats did reasonably put said materialmen in fear, and you further find that by reason thereof defendants did intimidate said materialmen so as to cause them to refuse to trade with and sell to the plaintiffs, or caused any of them to deal with plaintiffs on different conditions and terms than theretofore, to the damage of the plaintiffs, then the plaintiffs are entitled to recover such damages from the defendants.

If the plaintiffs are entitled to recover upon each of the matters separately submitted to you, your verdict should be made up as follows:

For inducing workmen to quit the service of plaintiffs, such damage, under all the proof, as fairly compensates them for the direct loss of such service. That loss would be the expense and value of time in procuring workmen to take their places, difference of wages, if any, shown by the proof, for the equivalent service, and any direct damage by delay of work necessary in making the exchange of hands.

For injury, if any, by reason of defendants' conduct with materialmen, such damage as fairly compensates for loss of time, any extra cost, if any, for the time, sand, and brick, and their delivery, over what they would have cost them without any interference by defendants.

And if you find for plaintiffs as to the brickwork of the Little Sisters of the Poor, the amount should be damages as fairly compensate for the loss of the work or contract, which should be estimated by deducting reasonable and probable cost, or what it was then worth to perform the contract, from the amount of plaintiffs' bid therefor.

In estimating what it was worth, or what it would then cost, you are to assume that the work would have been conducted in what you deem would have been the reasonably prudent and ordinary way. You should also take into account the services of the plaintiffs to superintend it, and the ordinary risks and conditions of such enterprises.

And by way of damages to be included in any amount you may find interest at the rate of six per cent. per annum from the time when such damage accrued to the —— day of ——, 19—, the beginning of this term of court.

If you find compensatory damages for the plaintiffs, and you further find that the defendants caused the injuries complained of maliciously, then you may add thereto, as compensatory damages, such sum as you think just for plaintiffs' expense in employing counsel to prosecute this cause of action. No testimony is admissible to prove the value, but you have had opportunity to estimate the same by actual observation of the service rendered by their attorneys.

And now, if, in the judgment of the jury, the defendants were actuated by such excessive degree of malice that mere compensatory damages are not, in your opinion, sufficient loss to and punishment of the defendants, then the law authorizes you to include, as part of your verdict, such sums of money as you justly think ought to be recovered in the name and for the benefit of the plaintiffs, as exemplary or punitive damages. The

law leaves it wholly to the discretion of a jury whether any sum whatever, and if any, how much, should be added therefor.

You will see to it that your care to administer justice in this respect will be in proportion to the large discretion which the law imposes on you, remembering that when you take from one to give to another as a punishment, it must only be in such sum as is just.¹

¹ Morris L. Buchwalter, J., in *Bricklayers' Union No. 1 v. Parker*, S. C. Judgments affirmed. See 31 W. L. B. 334.

Sec. 1986. Damages to be awarded in general.

It will be your duty further to consider whether your verdict, if for the plaintiff, shall be for nominal or substantial damages. In this connection it will be necessary to determine whether, under all the circumstances disclosed by the evidence, the plaintiff has suffered a real or substantial injury as alleged in the petition, or whether he has suffered only what is termed in law a nominal injury. Nominal damages may be presumed from the publication of libelous matter, but the amount of such nominal damages must be left to the good judgment of the jury to be exercised upon all the evidence. The amount awarded for nominal damages must rest in the sound discretion of the jury and may not exceed one cent.

The plaintiff contends that he has been greatly damaged by reason of such publication. If you find that the plaintiff has not suffered any real or substantial injury, he is entitled only to such nominal damages as I have indicated. If the plaintiff suffered real or substantial damages as alleged, then he is entitled to receive such a sum as in your judgment would fairly compensate him for such loss. It may be regarded, too, as settled in this state that in actions of tort, involving malice, fraud, insult, or oppression, the jury may, in estimating compensatory damages, take into consideration the reasonable counsel fee of the plaintiff in prosecuting this action for the redress of his injury as against the wrong-doer, even when there are mitigating circumstances not amounting to a justification.

In order that you may pass intelligently upon the question of damages, if any damages are to be awarded, it will be proper for you to consider the character and reputation and standing of the defendant. The extent of an injury to a person's reputation or character must depend partly on the nature of the publication itself, and partly on the character and reputation of the party involved. The law presumes every man's reputation to be good until the contrary is made to appear.¹ If you find the publication a libel, as the term has been defined, it will be left to you, after all, to say to what extent under all the circumstances and evidence his character and reputation have been damaged thereby, subject only to the propositions of law which have been given you by the court.

There is no way of reaching an accurate conclusion in cases like the one on trial except through the good judgment of the jury. The law therefore permits the jury to take such a view of all the facts and circumstances properly in evidence in the assessment of damages, and measure such damages accordingly as may have been shown by the publication itself.

You are to consider whether the publication complained of was made only with only such malice as the law implies from the mere doing of a wrongful act, which is recognized in the law as "implied malice," or with an actual evil intent or express purpose to injure; or that it was not only false but known to be so by the defendant at the time of the publication itself, or recklessly made without inquiry or information upon which the defendant was fairly justified in relying in its publication. It may appear to you on the contrary, that while the defendant may not convince you that he should escape the actual consequences of the alleged libelous matter, if wrongful in fact, yet there was no actual malice on the part of the defendant, no real or conscious intent to injure, no bad motive; that, though in fact false, the defendant in making the publication acted upon information on which he was fairly justified in relying; that there was more or less truth, or a greater or less approach to the truth in this publication to palliate to a greater or less

degree, or excuse in a greater or less measure the publication itself. You may consider all those circumstances. It is no defense, nor even a justification, for a newspaper to publish a communication of and concerning another libelous of itself, but at the same time it is proper for the jury to consider all the circumstances connected with such publication in mitigation of damages.²

¹ *Blakeslee v. Hughes*, 50 O. S. 490.

² *Dean v. Commercial Gazette Co.*, Hamilton county. Hunt (Saml. F.) J.
Approved by supreme court.

CHAPTER CXIV.

MALICIOUS PROSECUTION.

SEC.

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Sec. 1987. Essential facts to be found—Burden of proof.

The questions for the jury are:

Did the defendant institute the criminal prosecution set out in petition, and thereby cause the arrest of the plaintiff without probable cause, as the term is hereafter defined? Was he actuated by malice, either actual or implied? Did plaintiff suffer damages by reason thereby?¹

To enable the plaintiff to maintain this action it must appear by a preponderance of the evidence that both malice and want of probable cause concurred, and the burden of proof rests upon the plaintiff to maintain both the allegations of malice and want of probable cause.² It will be sufficient for you to find any disputed fact proved if it be supported by a preponderance of the evidence.³

¹ See Cooley on Torts, 208 (181).

² Cooley on Torts, 213 (184).

³ Voris, J., in *Weber v. Viall*, Summit Co. Com. Pleas. "An action for tort will lie when there is a concurrence of the following circumstances: 1. A suit or proceeding has been instituted without probable cause therefor. 2. The motive in instituting it was malicious. 3. The prosecution has terminated in the acquittal or discharge of the accused." Cooley on Torts, 208 (181).

Sec. 1988. Probable cause defined.

Probable cause is defined to be a reasonable ground for suspicion, supported by circumstances sufficiently strong in this case to warrant an impartial and reasonably cautious man—that is, a man of ordinary caution—in the belief that the plaintiff was guilty of the offense with which he was charged, and set out in detail in the petition in dispute. The true inquiry for you to answer is not what were the facts as to the guilt or innocence of the plaintiff, but what ought the defendant have reason to believe in reference thereto at the time he instituted the criminal proceedings and caused the arrest of the plaintiff.¹

So that in determining whether the defendant had probable cause or not, you should consider the question in reference to the facts and circumstances relating thereto, and which influenced him in causing the arrest and preferring the charges, as they were known, and as they reasonably appeared to be at the time, and not by the facts and circumstances as they have been developed since.²

If you find there was probable cause, as thus defined, then you need go no further, and your verdict should be for the defendant; but if you should find from the evidence that the defendant maliciously caused the arrest and preferred the charges against the plaintiff, without probable cause to believe that he was guilty of the offense alleged against him, then you should find for the plaintiff.

¹ The burden of proof to show want of probable cause rests upon the plaintiff. Cooley on Torts, 213 (184); and will not be inferred from mere failure of the prosecution. *Id.* Kinkead, Torts, sec. 425.

² Cooley on Torts, 211 (182), notes 3 and 4.

Sec. 1989. Malice may be inferred from want of probable cause.

If the jury find from the facts and circumstances proved on the trial, that the defendant had not probable cause as defined, and that he did prefer the charges alleged in the petition and thereby caused the arrest and prosecution of the plaintiff, then you may infer malice from such want of probable cause.¹ But this inference is not conclusive, and must be considered in relation to the other evidence submitted to you bearing upon this issue,² so you are to take into consideration all the circumstances given you in evidence relating to this branch of the case in determining whether defendant was actuated by malice or not, and you should be controlled by the preponderance of the evidence.³

In common acceptance, malice means ill-will against a person, or express malice, but in the legal sense it denotes a wrongful act done intentionally and without just cause.⁴

¹ Cooley on Torts, 214 (185); *Holliday v. Sterling*, 62 Mo. 321; *Harkrader v. Moore*, 44 Cal. 144; *Roy v. Goings*, 112 Ill. 662.

² Cooley on Torts, 214 (185) and cases cited.

³ See Cooley on Torts, 214 (185). The burden is upon plaintiff to prove malice, Cooley on Torts, 214; *Jordan v. R. R.*, 81 Ala. 220; *Hinson v. Powell*, 109 N. C. 534.

⁴ *Voris, J.*, in *Weber v. Viall*, Summit Co. Com. Pleas. *Probable cause* is a reasonable ground for suspicion supported by circumstances sufficiently strong to warrant a belief that the person accused is guilty. *Ash v. Marlow*, 20 O. 119. It depends upon the defendant's actual and reasonable belief. *White v. Tucker*, 16 O. S. 468, 470. Want of probable cause must be shown—the fact of acquittal does not show it. *John v. Bridgman*, 27 O. S. 22, 39. Want of probable cause, without malice, is not sufficient to authorize the action. *Emerson v. Cochran*, 111 Pa. St. 619. As evidence of malice the question of probable cause is wholly for the jury. *Hicks v. Faulkner*, L. R. 8 Q. B. D. 167; *Quartz Hill Co. v. Eyre*, L. R. 11 Q. B. D. 674. If facts are disputed, the question is for the jury; if undisputed, for the court. Cooley on Torts, 209 (181). "It is generally the duty of the court, when evidence has been given to prove or disprove the existence of probable cause, to submit to the jury its credibility, and what facts it proves, with instructions that the facts found amount to proof of probable cause or that they do not." *Stewart v. Sonneborn*, 98 U. S. 187.

Sec. 1990. Advice of counsel.

The defendant has interposed the defense that he acted in good faith, and upon the advice of a reputable attorney. As to this defense you are instructed that the advice of counsel constitutes a defense to this action.¹ If the defendant gave to his attorney a full and honest presentation of the facts bearing upon the guilt or innocence of the accused within his knowledge, or which by reasonable diligence could be ascertained by him, and which he has reasonable cause for believing he was able to prove, if the defendant acted in good faith and in accordance with the attorney's advice, it would make no difference whether the attorney was mistaken in his opinion and belief as to the existence of probable cause, or whether the facts communicated to the counsel constituted the offense (embezzlement) or not. The mistakes or errors of the counsel, so consulted, can not lay the foundation for damages against the defendant, if in other respects he is not liable under the instructions just given to you.²

¹ Barlight v. Tammany, 38 Am. St. 856; Johnson v. Miller, 82 Ia. 693; Jaggard on Torts, p. 621. "A prudent man is therefore expected to take such advice (of counsel); and when he does so and places all the facts before his counsel, and acts upon his opinion, proof of the fact makes out a case of probable cause," etc. Cooley on Torts, 212.

² Voris, J., in Weber v. Viall, Summit Co. Com. Pleas. All facts must have been communicated, 20 O. 119, 4 W. L. B. 1107, 16 O. S. 468, 30 W. L. B. 120; see Jaggard on Torts, 621. It is a question for the jury whether he acted *bona fide* on the opinion, believing that he had a cause of action. Cooley on Torts, 212 (No. 184), note 2.

Sec. 1991. Discharge by examining magistrate—Prima facie evidence of want of probable cause.

The fact that the examining magistrate discharged the plaintiff because he did not find him guilty of the charge on which he was arrested, and the failure of the defendant to further prosecute the case, would be *prima facie evidence* that the criminal prosecution and arrest was without probable cause, and not conclusive evidence thereof.¹ By *prima facie* evidence it

is meant such evidence as creates a presumption that these facts are established by it in the absence of any evidence to the contrary. In other words, it is of sufficient weight to establish the disputed facts until they are rebutted or overcome by evidence to the contrary. But this presumption must yield to the weight of the evidence submitted to you, taking the whole of it.²

¹ *Parkhurst v. Masteller*, 57 Ia. 474; *Hale v. Boylen*, 22 W. Va. 234; *Barber v. Gould*, 20 Hun, 466; *Sharpe v. Johnston*, 76 Mo. 660.

² *Voris, J.*, in *Weber v. Viall*, Summit Co. Com. Pleas. The record of the magistrate is evidence at least to show the facts of the discharge of the plaintiff. *John v. Bridgman*, 27 O. S. 22; *Cooley on Torts*, 213. It is not such evidence as will alone sustain an action for malicious prosecution. *Thorpe v. Balliett*, 25 Ill. 339.

Sec. 1992. Prosecution must have terminated.

You are instructed that before the plaintiff can recover for the malicious prosecution of a criminal charge, it must appear from the evidence that the prosecution is at an end; and it must also appear that the plaintiff was acquitted of the charge.¹

The defendant having had his day in court in the trial of the charge complained of, it is but reasonable to require that he shall, by the result of the trial, show the criminal charge to be untrue before he can prosecute another action on the ground that such charge was maliciously made.²

¹ *Fortman v. Rottier*, 8 O. S. 550; *Cooley on Torts*, 215 (186); *Cardinal v. Smith*, 109 Mass. 159; *O'Brien v. Barry*, 106 Mass. 300.

² *Id.* As to what kind of a determination will be sufficient to found suit on, see *Jaggard on Torts*, 610-11; *Cooley on Torts*, 215 (186).

Sec. 1993. Measure of damages—Compensatory—Counsel fees—Exemplary damages.

If you find the issues for the plaintiff, he will be entitled to recover compensatory damages at least. Compensatory damages with reference to this subject means such sum as in your judgment, guided by the evidence, the plaintiff ought to receive for the injuries caused by the wrongful acts charged in the petition, and that you can fairly say from the evidence was the direct and ordinary result thereof to his reputation on

account of mental suffering of the plaintiff, if such you find, and you may include as compensatory damages such amount as he was compelled to pay in the defense of the criminal action, and for reasonable time lost by reason of the arrest, and the defense he was required to make.

You may also include reasonable counsel fees incurred by the plaintiff in the prosecution of this case. It is a matter very much in the discretion of the jury, but this discretion must be exercised reasonably, so as to compensate for the injury actually sustained and nothing more, unless you find this a case for exemplary damages.

But if you find from the evidence that in committing the wrongs complained of it involved the ingredients of actual malice, intentional insult, and oppression on the part of the defendant, and the plaintiff had conducted himself in a reasonable manner under the circumstances, you may go beyond the rule of mere compensation and award exemplary or punitive damages; that is, such damages as will compensate him for the wrong done, and to punish the defendant, and to furnish an example to deter others.

If you find this a case that warrants exemplary damages, the law fixes no limit to your discretion in that behalf as to the amount, except that it requires at your hands that your discretion in that respect should be fairly, reasonably, judiciously and impartially exercised. It should be exercised without feeling, resentment or hasty consideration. And what, under all the circumstances, should be reasonable punishment is the true test.¹

¹ Nye, J., in *Weber v. Viall*, Summit Co. Com. Pleas.

Sec. 1994. Malicious injunction—Probable cause for commencing.

The mere commencing of said suit by the defendants against the plaintiffs, and obtaining said injunction against the plaintiffs, would not, and does not, give the plaintiffs a right to maintain an action against the defendants for malicious prosecution and for damages. In addition to that, the plaintiffs must

show by a preponderance of evidence that the said injunction was obtained by the defendants maliciously, and without probable or reasonable cause. These two points you are to decide as reasonable men, upon the evidence. Probable cause for the obtaining said injunction in such a state of facts, known to and influencing the defendants, as would lead a man of ordinary caution and prudence, acting conscientiously, impartially and reasonably, and without prejudice, upon the facts within the parties' knowledge, to believe or entertain a reasonable suspicion that they had the right to obtain and maintain the injunction. If you find that the defendants in this matter acted upon a reasonable ground of suspicion, that the plaintiffs had no right on said premises, while they, the defendants, had full right, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that defendants had a right to obtain and maintain said injunction, then they may find that there was probable cause for obtaining said injunction.

Probable cause does not depend upon the actual state of the case, but upon the reasonable belief of the defendants that they had a right to obtain and maintain said injunction; but this belief will not constitute a defense to this action, if all the circumstances under which defendants acted clearly show that there was no probable cause for their acts in this behalf, and that their belief was groundless and could not have been formed without the grossest ignorance and negligence. That is to say, taking into consideration all the facts relating to and going to make up the claim of title of plaintiffs in said twenty-three acres, which was known to the plaintiffs, did they honestly believe, and had they reason to believe that plaintiffs had no title to any interests in said twenty-three acres that gave the right to open mines thereon and mine coal? If they did so believe and had reason so to believe from the facts of which they had knowledge, then you will find for the defendants on this cause of action. Otherwise you will proceed next to the question of malice.¹

¹ Samuel F. Hunter, J., in *Newark Coal Co. v. Upson*, 40 O. S. 17. Approved. For interesting and instructive case and note on subject, see *Williams v. Hunter*, 14 Am. Dec. 597, 601; *Cooley on Torts*, 187.

No action can be brought to recover damages for the malicious prosecution of a civil suit where no rights of the plaintiff have been violated by seizure of property or invasion of liberty. *Bartholomew v. Met. Life Ins. Co.*, 1 Oh. Dec. 267. (Hamilton, J., Cuyahoga Com. Pleas.)

Sec. 1995. Malicious prosecution—Complete charge.

1. *Statement of claims.*
2. *Burden of proof.*
3. *Credibility of witnesses.*
4. *Termination of charge—Dismissal sufficient.*
5. *Probable cause—Burden of proving—Definition—Information obtained by police investigation.*
6. *Malice.*
7. *Advice of counsel.*

1. *Statement of claims.* The case is one of malicious prosecution of a criminal charge, and the right which is injured by such a wrong is the right of reputation.

The facts which plaintiff must establish in order to make out his case are the following: That he has been prosecuted on a criminal charge by the defendant, that the prosecution is at an end, and that it was instituted maliciously and without probable cause.

4. *Termination of charge—Dismissal sufficient.* Plaintiff must establish that the prosecution of which he complains was terminated. So long as the case is not ended one way or the other, either by acquittal or conviction, the outcome would be in doubt, and there could in such case be no right of action for malicious prosecution.

A dismissal of a criminal proceeding or action in the police court is a sufficient termination of the cause in order to lay the foundation for the prosecution of such a case as this, the same as would an acquittal of the defendant. The evidence of such disposition of a criminal charge in the police court is competent to show the fact of the discharge of the plaintiff from the criminal charge.

5. *Probable cause—Burden of proving—Definition—Information obtained by police investigation.* The burden is on the plaintiff to show want of probable cause, because the presumption of law is that every prosecution is founded upon probable cause and is instituted for the purpose of justice only. That presumption must be overcome by the plaintiff, and the mere fact of the dismissal of the action by the police court, or the acquittal, is not enough to overcome the presumption. Other evidence is necessary to show want of probable cause.

Probable cause is a reasonable ground for suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious, prudent man in the belief that the person accused is guilty of the offense for which he is charged. That is, the question is whether the defendant had a reasonable ground for suspicion supported by the circumstances, by what had been reported to him by persons claiming to have knowledge of the fact, or by any report of an investigation made by police officers of the case which came to his knowledge, if any did. If the defendant had such reasonable ground for suspicion, and if the same was supported by circumstances and reports of investigations were sufficiently strong to warrant him as an impartial and reasonably cautious man in the belief that plaintiff was guilty of the offense, then he can not be held responsible for the complaint made in this case.

It can not be expected that the defendant in making this criminal complaint should act upon facts personally known to him, but he may be allowed to act upon information which he obtains from others, if it is of a credible nature; if it is such as to warrant an ordinarily prudent person under similar circumstances acting in good faith to believe that the plaintiff, under all of the facts and circumstances coming to his knowledge, was guilty of the crime charged.

Prudence required that the defendant in preferring the complaint, should make some kind of an investigation, such as would reasonably satisfy him of the truth of the facts. It is for the jury to determine as a matter of fact, whether or not under all the circumstances of this case the investigation that may appear

to have been made as shown by the evidence was such as was reasonably necessary under the peculiar circumstances of this case. The defendant could not be expected to personally know all the facts and circumstances of the crime, and the public welfare demands prompt action in the prosecution of criminal cases. The jury may therefore consider the evidence as to the part taken in the investigation of the charge by the police and by the detectives of the city, in connection with all the other evidence upon the question of the existence at the time of probable cause and determine the fact upon the whole evidence.

It depends largely upon the character of the information and upon the character of the person from whom the information is received whether it should be deemed reliable or not. That is why this case is submitted to the jury, for it to determine that fact along with the others, it being regarded as peculiarly within the province of the jury to determine whether or not the information which came to the defendant, and any advice that he may have properly received from counsel, was such as to warrant a reasonably prudent man in acting upon it and preferring this criminal charge. The reasonable ground, in order to form the basis of want of probable cause must be considered by the jury as existing at the time the charge was made, and as it probably appeared to the defendant at that time, and not as it may have appeared afterwards, at any time afterwards in the light of subsequent developments.

On the question of the existence of probable cause, while the jury may consider the testimony as to the innocence of the plaintiff of the charge made against him, still the jury is instructed that if it should find aside from the question of innocence that the facts and circumstances made known to the defendant before, and at the time he filed the affidavit were such as to cause a reasonably prudent man in believing plaintiff to be guilty of the crime, then the jury may find in such event that there was probable cause, and in such case your duty would be to render a verdict for the defendant and against the plaintiff.

6. *Malice.* Malice is an essential ingredient or characteristic of the wrong of malicious prosecution. Unless it appears that the defendant was actuated by malice in the prosecution or preferment of the charge against plaintiff, this action for malicious prosecution can not be maintained.

Malice as used in law does not necessarily mean spite or ill will toward a particular individual. It means, on the other hand, an evil design in general, or the outgrowth of a wicked and depraved mind, a mind devoid of ordinary social duties; a mind which does not appreciate or regard the obligations to mankind in general, or to society. It is a term used to characterize reckless or wanton disregard of the rights of another. Its general use in law is to express an act done without any sufficient reason, without any lawful excuse, when the act proves to be wrong in itself. Malice in law is that which may be inferred from the unlawful act which is done wilfully and purposely but without any motive to injure another, or where the act is done through mere wantonness or gross carelessness.

If the jury should find in this case that there was probable cause for making the charge, then it could find no malice. If the jury finds that the defendant in making the charge acted without probable cause, according to the meaning of the term given it, then it would be warranted in inferring from such want of probable cause that the preferment of the charge by the defendant against the plaintiff was done with malice.

7. *Advice of counsel.* The defense in this case is that the defendant acted upon the advice of counsel. Concerning this claim the jury is instructed that the advice of counsel constitutes a defense to this action. If it should appear from the evidence that the defendant gave to the attorney, the prosecuting attorney of the police court in this case,—a full and honest presentation of the facts bearing upon the guilt or innocence of the accused, within his knowledge, or which by reasonable diligence could be ascertained by him, and which he had reasonable cause for believing he was able to prove, if the defendant acted in good faith and in accordance with the attorney's ad-

vice, it would make no difference whether the attorney was mistaken in his opinion and belief as to the existence of probable cause, or whether the facts communicated to counsel constituted an offense or not. Mistakes or errors of counsel so consulted can not lay the foundation for damages against the defendant, if in other respects he is liable under the instructions given you by the court. The question for the jury then is whether defendant laid before the police prosecutor, to whom he went for advice, and who called the defendant to his office, as it appears in the evidence, all the information that he reasonably could obtain in regard to this alleged offense. If he did, or if it should appear in evidence that the police prosecutor himself gave directions to certain officers of the police court to make investigations into this alleged crime, and that they were reported to the police prosecutor, and the same afterwards came to the knowledge of the defendant, and if upon all that was communicated by either the officers or by the defendant in this case to the police prosecutor, and if all that was so communicated in either way was all that could have been reasonably obtained under such circumstances, and if it should appear that the defendant acted in good faith in seeking and relying, if he did rely on the advice of the prosecutor, then the jury is instructed that that constitutes a complete defense to the charge made by the plaintiff in this case.¹

¹ *Berg v. Eichenlaub*, Franklin Co. Com. Pleas. Kinkad, J. These instructions contain new elements concerning the obtaining of information from police investigation as reflecting upon probable cause. The case did not go farther.

CHAPTER CXV.

MALPRACTICE.

SEC.

1996. Care required of physician.

1997. Duty of physician to use reasonable and ordinary care—Another form.

1998. Contributory negligence of patient.

1999. Liability of surgeon for performing operation without consent.

1. Consent presumed unless concealment of facts.

2. Consent essential.

3. Presumed by submission to operation.

SEC.

4. Express consent after physical examination.

5. Authority to do what reasonably necessary to save life.

6. Patient chargeable with acts of preparation.

7. Care by physician after operation.

2000. Liability of physician for injuries caused by use of X-Rays.

Sec. 1996. Care required of a physician.

You are instructed that a surgeon or physician who offers his services to the public that he impliedly agrees with those who employ him that he possesses that reasonable degree of learning, skill, and experience which is ordinarily possessed by persons engaged in that profession, sufficient to qualify him to engage in that profession. A surgeon assumes to exercise the ordinary care and skill of his profession, and is liable for injuries resulting from his failure to do so.¹

The implied contract which the physician or surgeon thus enters into does not extend to an agreement that he will cure, but only that he will employ such reasonable skill and diligence as are ordinarily exercised in his profession by physicians. The law does not, however, require the highest degree of skill and science. The standard must be a practical and attainable one.²

He does not undertake for extraordinary care or extraordinary diligence any more than he does for uncommon skill.

In stipulating to exert his skill and apply his diligence and care, he contracts to use his best judgment.³

¹ *Geiselman v. Scott*, 25 O. S. 86; *Jaggard on Torts*, 910; *Cooley on Torts*, 778 (649).

² *Jaggard on Torts*, 912; *Cooley on Torts*, 778 (649).

³ *Leighton v. Sargent*, 27 N. H. 460. "As the promise is not different in the case of the physician and surgeon from what it is in the case of the attorney, etc., one general rule may be given." *Cooley on Torts*, 777 (648).

Sec. 1997. Duty of physician to use reasonable and ordinary care—Another form.

The jury is instructed that the legal responsibility of a physician is such that he contracts with his patient that he has the ordinary skill of members of his profession in a like situation, that he will exercise ordinary care and reasonable diligence in his treatment of the case, and that he will use his best judgment in the application of his skill to the case.¹ A physician and surgeon is required to exercise that degree of knowledge and skill and care which physicians and surgeons practicing in similar localities ordinarily possess. In other words, a physician is held to that care and skill which is exercised generally by physicians of ordinary care and skill in his and similar communities. The physician is not chargeable with negligence for failure to use the best skill and ability if he uses the care and skill which is exercised generally by physicians of ordinary care and skill in similar localities.² The physician is not an insurer: he does not warrant a favorable result. The practitioner can not be expected to know, or be bound to know or to diagnose correctly, that which is unknowable.³

¹ *Henslin v. Wheaton*, 91 Minn. 219; 1 Ann. Cas. 19, 103 Am. St. 504, 64 L. R. A. 126; *Gore v. Brockman*, 138 Mo. App. 231; *Sauers v. Smits*, 49 Wash. 557, 95 Pac. 1097, 17 L. R. A. (N.S.) 1242.

² *Hales v. Raines*, 146 Mo. App. 232, 130 S. W. 425.

³ *Henslin v. Wheaton*, *supra*.

Sec. 1998. Contributory negligence of patient.

If you shall find that the defendant directed the plaintiff to observe absolute rest as part of the treatment to said foot, and

that direction was such as a surgeon or physician or ordinary skill would adopt or sanction, and the plaintiff negligently failed to observe such direction, or purposely disobeyed the same, and that such neglect or disobedience approximately contributed to the injuries of which he complains, he can not recover in this action, although he may prove that the defendant's negligence and want of skill also contributed to the injury. This grows out of the doctrine that a party who has directly, by his own negligence or disregard of duty, contributed to bring an injury upon himself, can not hold other parties who have also contributed to the same responsible for any part thereof, nor does it make any difference that one of the parties contributed in a much greater degree than the other; the injured party must not have contributed at all.¹

¹ Approved in *Geiselman v. Scott*, 25 O. S. 86.

Sec. 1999. Liability of surgeon for performing operation without consent.

1. *Consent presumed unless concealment of facts.*
2. *Consent essential.*
3. *Presumed by submission to operation.*
4. *Express consent after physical examination.*
5. *Authority to do what reasonably necessary to save life.*
6. *Patient chargeable with acts of preparation.*
7. *Care by physician after operation.*

1. *Consent presumed unless concealment of facts.* Consent of a person voluntarily submitting to a surgical operation is presumed, unless there are such circumstances shown by the evidence as show that she was the victim of a false or fraudulent misrepresentation, or of such concealment of facts as would deceive. If, therefore, such a false or fraudulent misrepresentation or deception is relied upon in this case, then such fact or facts should be established by the plaintiff by proof, the same as any other material fact relied upon by the plaintiff.

2. *Consent essential.* It is my duty to charge you that the consent of the plaintiff was necessary before the defendants or

either of them could lawfully perform the operation which was performed. If such consent were not given, then the defendants had no right to operate upon her in the manner complained of, whether the same was necessary and advisable or not.

3. *Presumed by submission to operation.* But if there was no misrepresentation as to the nature of the operation and she submitted herself to the physicians for an operation, then her consent will be presumed to the performance of such operation as was reasonably necessary to save her life and to protect her from continued and serious illness.

4. *Express consent after physical examination.* Furthermore, even if you find the fact to be that Dr. B. did advise the plaintiff before she went to the hospital that the only operation necessary or that would be performed would be a minor operation which would not necessitate the use of a knife, yet, if after she went to the hospital an examination was made and she was there informed that certain organs might have to be removed to save her life and she then gave her consent to such operation, then the previous representations are immaterial and such previous representations will not render the defendants or either of them liable, because all such previous representations were waived by her, if, after learning that a more serious operation was necessary, she gave her consent.

5. *Authority given to do what reasonably necessary to save life.* If the plaintiff here could not appreciate and did not know her own condition, or the ailments with which she was afflicted, and if she placed herself in the care and hands of the defendants here and authorized them to do what was reasonably necessary from their knowledge and skill as physicians to save her life or to restore her health, then such a submission on her part, in the absence of any other restrictions upon the physician, demanded and made it incumbent upon those physicians to do such things and perform such operation as by the nature of the case and by the exercise of proper skill and knowledge as physicians, was necessary to save her life, or to protect her from continued and serious illness. And the failure of physicians,

under such circumstances to have so operated would have been valid grounds for a suit against them in malpractice. Consent may be given either by words or you may find consent to have been given by acts. This question of consent is to be determined by you from all the facts and circumstances surrounding the operation itself, and those which precede as well as those which follow it. If the consent of plaintiff was given for an operation to a mere limited extent, and she either forbid or did not consent to the removal of the other parts of her body, then the physicians are bound to follow that limitation and the consent to a limited treatment could not be interposed to excuse the defendants or justify them in performing some other and different operation.

6. *Patient chargeable with acts of preparation for operation.* With reference to the testimony and evidence here concerning the nature and extent of the preparation made for this operation, the plaintiff is chargeable with a knowledge and understanding of so much and to such extent as she under all the facts and circumstances surrounding her ought and necessarily would know and understand, and no further.

In speaking of consent, I refer only to the consent of the plaintiff; as the consent of any other person, relative or friends of the plaintiff, was not necessary.

7. *Care by physician after operation.* As to the claim of negligence in the care and treatment of the plaintiff after the operation these physicians are chargeable with that degree of care and skill which physicians and surgeons, exercising care, would ordinarily exercise in the treatment of a patient under similar circumstances.

In determining whether the defendants exercised proper care and skill, you will consider the nature of this operation, and its results, and if you find they exercised such care and skill in the treatment of the wound after the operation as surgeons of ordinary skill and caution would exercise for the cure of a patient under similar circumstances, then there is no liability on account of the treatment of the wound.

You are not to conclude from the mere fact that the plaintiff has a rupture and suffers from other ill effects of the operation that these effects are due to the negligence of the defendants in treating the wound. If such effects resulted not from negligent treatment, but are the results of the nature of the operation itself, and you find the plaintiff consented to the operation, then there is no liability on account of the after treatment of the wound. If such effects are due to the negligence of the defendant as alleged, then they are liable.¹

¹ *Cuthriell v. The Protestant Hospital*, a corporation, and *W. J. M. and J. W. B.* Court of Com. Pleas, Franklin Co., O. *Bigger, J.* On subject of consent to operation, see *Bennan v. Parsonnet*, 83 Atl. 948 (Sup. Ct. N. J.), citing *Kinthead*, on Torts, sec. 375. See also 111 Am. St. 468.

Sec. 2000. Liability of physician for injuries caused by use of X-Rays.

The jury is instructed that when a physician holds himself out to the public as qualified in the use of the X-ray for treatment and diagnosis of ailments, the law implies on his part the promise and duty to exercise reasonable skill and care in such use. In other words, he undertakes to use in this particular branch of the profession the same degree of care and skill required of physicians and surgeons generally and ordinarily used in other branches of the profession. The use of the X-ray in the diagnosis and treatment of human ills is recognized and practised by the medical profession, and therefore the same rule and measure of care is required of such practitioners in this line of the profession as is applied to other practitioners.¹

¹ *Sweeney v. Erving*, 35 App. Cas. (D. C.) 57; *Hales v. Raines*, 146 Mo. App. 232; *Shockley v. Tucker*, 127 Ia. 456, 103 N. W. 360, Am. Ann. Cas. 1912, C. p. 1124, note. *Sauers v. Smits*, 49 Wash. 557, 95 Pac. 1097, 17 L. R. A. (N.S.) 1242.

CHAPTER CXVI.

MANSLAUGHTER.

(See also HOMICIDE, MURDER FIRST AND SECOND DEGREE.)

SEC.

2001. Manslaughter—By negligent driving of automobile—
A complete form of instructions (See detailed headings of subjects in text).

2002. Charge of manslaughter by one attempting to arrest another. (See headings at sectional heading.)

SEC.

2003. Negligent driving of automobile as forbidden by statutes constitutes manslaughter.

2004. Contributory negligence of deceased no defense in manslaughter caused by neglect of driver of automobile.

Sec. 2001. Manslaughter—By negligent driving of automobile—A complete form of instructions.

1. *Introduction.*
2. *Plea, and burden of proof.*
3. *Presumption of innocence.*
4. *Reasonable doubt.*
5. *Credibility of witnesses.*
6. *Same—Opinion as to speed not deemed contradictory as affecting credibility.*
7. *The charge in the indictment.*
8. *Law of manslaughter—Statute—Meaning of “unlawfully kills”—Kinds—Involuntary—Malice—Intent.*
9. *Unlawful act, one prohibited by law.*
10. *Statute as to speed of automobile.*
11. *Opinion evidence as to speed.*
12. *Alternative finding as to rate of speed.*
13. *Violation of statute by excessive speed must be proximate cause of death.*
14. *May find defendant guilty of assault and battery.*

1. *Introduction.* GENTLEMEN OF THE JURY: You have heard the evidence and the arguments of counsel and it is now the duty of the court to give you such instructions as to the law applicable to the evidence in this case which will guide you in the determination of the issues of fact presented to you for decision.

2. *Plea, and burden of proof.* The defendant is indicted for the crime of manslaughter. He has entered a plea of not guilty. That is, he denies each and all of the essential elements charged in the indictment which constitutes the crime of manslaughter.

That imposes upon the state the burden of proving all those elements to your satisfaction and beyond a reasonable doubt, which is the degree and measure of proof necessary to be applied by you in your consideration of the case in arriving at a verdict.

3. *Presumption of innocence.* The law presumes, however, in all criminal cases that the defendant is innocent of the crime until he is proven guilty; that is, it is your duty under the law, notwithstanding the indictment, to presume that the defendant is innocent unless or until the evidence rebuts that presumption. The theory of this rule of presumption is that you enter upon the consideration of the case, as if the defendant is innocent, so that you may fairly and impartially consider the evidence, without bias, prejudice or suspicion because of the indictment. If the evidence overcomes this presumption, then the rule of evidence to be applied by you is the reasonable doubt rule.

4. *Reasonable doubt.* A reasonable doubt may be such state of mind on the part of the jurors, after having fairly and impartially weighed and considered all the evidence, that you may have an honest, substantial feeling of uncertainty or doubt as to the guilt of the accused, which rests upon some reasonable ground disclosed by the evidence. If there is nothing in the evidence that may fairly and reasonably cause you to have such a doubt, but, on the contrary, you may have such feeling in your minds that you have an abiding conviction of the guilt of the accused, it will then be your duty to convict him.

If, however, you entertain a reasonable doubt, which is substantial and not speculative, or captious, then you should acquit him.

5. *Credibility of witnesses.* The credibility of witnesses is within your exclusive province to determine. You may consider their demeanor while on the witness stand, their interest, if any, they have, or want of interest, any bias or prejudice which they may display, if you find that they do show such qualities, their ability to learn, know and recite the matters to which they may testify, the reasonableness or unreasonableness of their statements, the probability or improbability of their testimony in the light of all the facts and circumstances disclosed by the evidence.

6. *Same—Opinion as to speed not deemed contradictory as affecting credibility.* The law in respect to the opinions of witnesses concerning a question of speed is such that this class of testimony is of such character and nature that the testimony of witnesses concerning rates of speed is not to be deemed contradicted for purposes of affecting their credibility, so that their credibility is not necessarily affected by the testimony of others whose opinions are different.¹

7. *The charge in the indictment.* The indictment in this case charges that the defendant, W. J. W., late of said county, on or about the ——— day of ———, in the year of our Lord one thousand nine hundred and ———, within the county of ——— aforesaid, unlawfully did kill one H. H., then and there being.

8. *Law of manslaughter—Statute—Meaning of “unlawfully kills”—Kinds—Involuntary.* The jury will now be instructed concerning the law relative to the crime of manslaughter.

The statute of Ohio reads as follows:

“Whoever (excepting in the preceding sections defining murder in the first and second degrees) unlawfully kills another is guilty of manslaughter.”²

What constitutes manslaughter under the statute, therefore depends upon what the word “unlawfully” means.

¹ Moore on Facts, sec. 120; *Railway v. Waxelbaum*, 111 Ga. 812.

² Code, sec. 12404.

We construe the meaning of the word by the principles of the common law,—the law established by the courts,—before and since the enactment of statutes. The common law definition of manslaughter was as follows: “The unlawful killing of another, without malice, either express or implied; which may be either voluntarily, upon a sudden heat, or inadvertently, but in the commission of some unlawful act.”³ The courts have held that the statute originally enacted in this state was the crime of manslaughter as it was understood at the common law.⁴ And while this statute has been since changed to read in its present form, the evident construction placed upon it is such as is given in the light of the common law, and the court of last resort in this state as late as 1902 has declared that the present section defining manslaughter is not different in substance from the original enactment in this state which was the common law definition above stated; that the present section is not different in substance and meaning from the common law, and that to ascertain the elements of the crime of manslaughter, we must look to the original enactment as it stood before revisions of statutes. Therefore, in any case of manslaughter, and in the one at bar, it is incumbent upon the state to show that the killing was done unintentionally while the defendant was in the commission of some unlawful act. We have, therefore, the two kinds of manslaughter, voluntary and involuntary.

The kind of manslaughter charged in this indictment is involuntary, or an inadvertent killing while the person charged, was engaged in the commission of an unlawful act.

In this kind of manslaughter, malice is not essential, nor is intent to kill essential. The only kind of intent involved in involuntary manslaughter is such as may be inferred by the jury from the mere commission of an unlawful act. And the rule of law in such cases is that every one intends the natural and ordinary consequences of his own act

9. *Unlawful act, one prohibited by law.* Now, the unlawful act contemplated by the statute describing the crime of man-

³ Sutcliffe v. State, 18 Ohio, 469, 476.

⁴ *Id.*

slaughter, the commission of which gives color and character to the unintentional killing, is an act prohibited by law; that is, by a statute enacted by the legislature of the state.⁵ No act or omission is punishable as a crime in Ohio, unless the same is specially enjoined or prohibited by the statute of the state.⁶ The word "unlawful" used in the statute meaning the violation of a statute will embrace and include an unintentional killing if such act be committed while engaged in the violation of the provision of a statute making the acts forbidden penal or criminal in their nature.

10. *Statute as to speed of automobiles.* Now the violation of the statute of the state upon which this prosecution is based, in addition to that prescribing the crime of manslaughter, is section 12,604 of the code, which provides that:

"Whoever operates a * * * motor vehicle at a greater speed than eight miles an hour in the business and closely built up portions of a municipality, or more than fifteen miles an hour in other portions thereof, shall be fined not more than \$25.00, and for a second offense shall be fined not less than \$25.00 nor more than \$50.00."

Excessive violations of speed, therefore, are made by this statute misdemeanors.

The words "motor vehicle" and "automobile" are synonymous; that is, they mean the same thing.⁷

The claim of the state is that the cause of death of H. H. was due to the alleged violation of the law regulating the speed of automobiles, by running at a speed in excess of that prescribed by the statute.

On the other hand, the defendant denies that he was running in excess of such speed. And the defendant claims in evidence that the death of H. H. was caused by his own act in running across the street.

The jury will be called upon to determine whether the defendant did or did not at the time charged exceed the limit of

⁵ Johnson v. State, 66 O. S. 59, 69.

⁶ Smith v. State, 12 O. S. 466, 469, 66 O. S. 69.

⁷ Brown v. State, 10 N. P. (N.S.) 238.

speed prescribed by statute, and if you find that he did, whether such act of alleged violation of the statute as to speed, was either a sole or contributing cause of the collision of his automobile with the boy, or whether notwithstanding the alleged excessive rate of speed, the injury or collision with the boy was unavoidable, or whether it was due to the sole act of the boy.

11. *Opinion evidence as to speed.* Under the law an adult of reasonable intelligence and ordinary experience who observes the passing of an automobile just before an accident occurs is presumptively capable, without proof of further qualification, to give his opinion as to the speed of the automobile.⁸ So the law is that an ordinary observer, acquainted with automobiles, but with neither practical nor technical knowledge of their construction or management may be permitted to give his estimate as to the rate of speed at which a machine was proceeding at a given time.⁹

While the law is that such persons are competent to give an estimate as to the speed, the probative force of such opinion, estimate, or judgment is for the jury to determine. The law being that such evidence is received with caution, it is the duty of the court to state to the jury that in the consideration of this testimony and the weight which you may give it, you should consider the experience, training or acquired aptitude, or want thereof, for the giving of a judgment of speed, as well as the degree of care and attention which a witness may have been devoting to the matter of speed at the time he arrived at his opinion.¹⁰

The law does not permit courts to pronounce judgment or sentence for consequences of the violation of the inhibitions of the statute as to the rates of speed on opinions based on conjecture or guess, but demands that the basis thereof shall be facts.¹¹ Nor does the law sanction or permit a description of speed as "high," because that is nothing to the purpose even

⁸ Chamberlain on Ev., sec. 208.

⁹ 84 Kan. 608.

¹⁰ Chamberlain on Ev., sec. 2086, p. 2767.

¹¹ *Id.*, sec. 26, p. 2767; Moore on Facts, sec. 120, 187 Pa. St. 451.

when the specific inquiry is as to the rate of travel. The law regards such testimony as too uncertain for judicial action.¹² Therefore, any testimony of this kind will be disregarded by the jury in this case.

On the other hand, it is competent for the jury to consider the fact as to the distance within which the machine in this case is claimed to have stopped after the collision with the boy in arriving at the conclusion concerning the rate of speed at which the defendant's machine was run.

The jury may also consider the opportunity which the non-expert witnesses may have had which enabled them to give their judgment, the attention they may have been given to the speed of the automobile, when their attention was first given to the same, and the position in which such witness or witnesses were in at the time when they observed the machine.

It is also proper and within the province of the jury to consider whether a witness has had experience in driving an automobile, or whether he has not had such experience, or whether he has or has not had experience in riding in an automobile or whether he has or has not had an opportunity in observing and noting the rates of speed at which automobiles have been run.

12. *Alternative finding as to rate of speed.* If you should have a reasonable doubt from all of the evidence, whether the defendant at the time he was driving his machine at a rate of speed greater than fifteen miles an hour, it will then be your duty to render a verdict of not guilty.

But if you should have an abiding conviction that defendant was driving his machine as charged at a greater speed than fifteen miles an hour, then it will be your duty to further find whether the fact of the defendant's running his machine at an unlawful rate of speed was either the sole cause of the death, or whether it was a contributing cause of the death of the boy.

13. *Violation of statute by excessive speed must be proximate cause of death.* The court instructs the jury that the law does not make the defendant guilty of manslaughter even if he was

¹² *Nicholson v. Traction Co.*, 14 N. P. (N.S.) 177, 23 O. D. —; *Moore on Facts*, sec. 466, 167 Pa. St. 438, 163 Pa. St. 102.

running his automobile more than fifteen miles an hour in violation of the statute at the time the boy was run into and killed, if the act of H. H. himself was the sole cause of his death.

So, therefore, though the jury should find that the defendant was running at an unlawful rate of speed, still if you find that the act of H. H. in passing across the street, in whatever manner you may find from the evidence that he did pass across the street, was the sole cause of his death, then the jury should acquit the defendant.

But the law would make the defendant responsible and liable even though the boy himself was guilty of conduct contributing to his own death, if he,—the defendant,—was running at an unlawful rate of speed, and such unlawful act contributed to the death of H. H.

Therefore, it follows that if the jury finds that the boy himself by his own conduct endangered his own safety, still if you find that the defendant was running his machine at an unlawful rate of speed and that such unlawful act on his part contributed, not necessarily as a sole cause, but as a contributing, proximate cause, your verdict in such case should be one of guilty.

If the jury should find the defendant not guilty of manslaughter, you may find him guilty of either assault, or of assault and battery, if in your opinion the evidence warrants such a verdict.

14. *May find defendant guilty of assault and battery.* The law is that one who intentionally violates the statute prohibiting the driving of an automobile beyond fifteen miles an hour in a municipality in portions thereof other than in the business and closely built up portions of such municipality and who while so violating such statute runs into and strikes a person rightfully passing upon or across the street, is guilty of assault and battery, notwithstanding the injury was unintentionally inflicted.¹³

If, therefore, the jury should find the defendant not guilty of manslaughter, you may, if you believe the evidence warrants it, find him guilty of assault and battery, or of assault alone.

¹³ Fishnick v. State, 10 N. P. (N.S.) 110.

If you should find him guilty of any crime you will say so by your verdict.¹⁴

¹⁴ State v. Woodlin, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 2002. Charge of manslaughter by one attempting to arrest another for felony.

1. *The charge.*
2. *Manslaughter defined.*
3. *May make arrest for murder on reasonable cause without warrant.*
4. *When right to kill in arresting for felony justified.*
5. *Claim of self-defense.*

1. *The charge.* The specific charge in the indictment is as follows:

That S. H. on or about the —— day of ——, in the year 19—, at the county of —— aforesaid did unlawfully kill G. M., then and there being.

The statute of this state defines manslaughter as follows:

2. *Manslaughter defined.* Whoever unlawfully kills another except as provided in the three preceding sections, is guilty of manslaughter.

The three preceding sections of the statutes referred to in this definition of manslaughter are those sections of the statutes which define murder in the first and murder in the second degree. It is not necessary that the killing, to constitute manslaughter, should be done with deliberation and premeditation, nor done maliciously; it is incumbent upon the state to prove that the killing was done either upon sudden quarrel or intentionally while the slayer was in the commission of some unlawful act. In this case the person killed was not guilty of the crime for which the defendant was seeking to arrest him, but it is the claim of the defendant that he believed him to be one N. F., who was charged with having committed a murder shortly before that in this county, and that he believed that M. was the

man guilty of the murder. The defendant did not have a warrant for the arrest of the deceased, or for the arrest of any one charged with the commission of that crime. In a sudden affray between the defendant and the deceased M., M. was killed.

It becomes important, therefore, for you to determine whether or not the attempted arrest of M. was lawful under the circumstances upon the part of this defendant.

3. *May make arrest for murder on reasonable cause without warrant.* Where the crime of murder has been committed it is lawful for any person without a warrant to arrest another whom he believes and has reasonable cause to believe is guilty of the offense, and to detain him until a legal warrant can be obtained. You will observe that it is not essential that the person arrested should in fact have committed the crime; it is essential, however, that the defendant believe, and further, had reasonable ground to believe that the person he was trying to arrest was the one who committed the crime. It is not enough, you will observe, that he believed, but before the defendant can justify an attempt to arrest the deceased without a warrant—who was not guilty of the crime for which he was seeking to arrest him—it must further appear that under all the circumstances he had reasonable cause to believe M. to be the man who had committed the murder.

It is essential to a lawful arrest without a warrant that it be shown that a felony has been committed, and murder is a felony.

If you find that at the time the defendant attempted to arrest M., a murder had been committed, and that he believed in good faith, and further, that he had reasonable ground to believe that M. was guilty of the crime of murder, then he was justified in trying to arrest him although he was mistaken.

If, however, you find that the defendant did not believe in good faith, or that although he believed it, yet that he did not under all circumstances have reasonable cause to believe it, then his act in attempting to arrest an innocent man for the commission of murder was not justifiable and if in trying to arrest

M. under such circumstances he shot and killed M., he is guilty of the crime of manslaughter and you should so find.

Whether the defendant did in good faith believe that M. was the man who had committed this murder, and whether he had reasonable cause to believe it, are questions of fact which you, gentlemen of the jury, must determine from all the evidence in the case.

If you find the fact to be that the defendant believed and that he had reasonable cause to believe that M. was guilty of the murder, then, as I have said, his attempt to arrest M. was not unlawful and he is not guilty unless the means employed by him to effect the arrest were unlawful.

4. *When right to kill in arresting for felony justified.* The law does not clothe an officer or other person who is rightly trying to arrest another, with authority to judge arbitrarily of the necessity of killing the person to secure him. He can not kill in trying to make an arrest unless there is necessity for it. He is not justified in using unnecessary force or in resorting to means likely to take the life of the person he is attempting to arrest if the arrest could be effected otherwise.

If you find the defendant was justified in attempting to arrest M., it becomes your duty to determine the further question as to whether or not the means he employed to make the arrest were under all the circumstances existing at that time necessary to make his arrest. If you find he was justified in attempting to arrest the deceased, by reason of his belief of his guilt of the crime of murder—that is, believing that he was F., whom he believed to be guilty of the murder, and because of his having reasonable cause to believe it—then he would be justified in using such force and such only as, having regard to all the circumstances surrounding him at the time, would be reasonably necessary to effect the arrest, even to the taking of the life of the person he was trying to arrest. If you find that was the only means by which it could be effected, a homicide under such circumstances would be justifiable and your verdict should be not guilty.

If, however, you find that under all the circumstances it was not necessary to kill M. in order to effect his arrest, although the defendant may have believed him to be the guilty man and had reasonable cause to believe it, his killing under such circumstances would be unlawful and the defendant would be guilty of the crime of manslaughter.

5. *Claim of self-defense.* The defendant claims further that he acted in self-defense. Homicide is justifiable on the ground of self-defense where the slayer in the careful and proper use of his faculties, in good faith believes and has reasonable ground to believe that he is in imminent danger of death or great bodily injury and that his only means of escape from such danger will be by taking the life of his assailant, and this is true although he may be mistaken as to the existence or imminence of the danger. The existence of the danger is not indispensable, but the defendant's belief of its existence is indispensable, and the further fact is indispensable that there must have been reasonable ground for the belief. Furthermore, one who brings on a conflict without just cause or excuse can not justify on the ground of self-defense, even though he may be placed in a position of great peril, but must himself first withdraw from the conflict thus unnecessarily and unjustifiably brought on by him, before he can assert the right of self-defense.

So in this case if you find the defendant was not justified in attempting to make this arrest, then having attempted to do an unlawful thing, if you find that the defendant first made an assault on M. for the purpose of arresting him and in the progress of the conflict thus brought on he killed M., the killing would constitute manslaughter. If the defendant merely called to the deceased, asking him to stop, and before the defendant had attempted to use any force to cause the arrest or to make any move toward the using of force to cause the arrest, M. fired upon the defendant, then the defendant might act in self-defense under the rules I have stated to you, but could not take the life of the deceased unless he believed and had good reason to believe that he was himself about to be killed or to suffer

great bodily injury and that his only means of escape was to shoot M.

Where one seeks to justify or excuse a homicide on the ground of self-defense, the burden of proving that homicide was so excusable or justifiable on the ground of self-defense is upon the defendant and must be established by a preponderance of the evidence.

If the defendant discovered at any time before he fired the fatal shot that the person he was trying to arrest was not the man whom he believed guilty of the murder, then it was his duty at once to desist from further attempt to make the arrest and his conduct in shooting the defendant after such discovery would only be excusable upon the ground of self-defense. If after such discovery he believed he was in imminent danger of death or great bodily harm and that his only means of escape was in shooting M., he would be justified in so doing, but under no other circumstances.

Under such an indictment, if the defendant be found not guilty of manslaughter he may be found guilty of assault and battery or simply assault. Any unlawful violence upon the person of another is assault and battery and any act toward the commission of a battery is an assault.¹

¹ State v. Hardy, Franklin Co. Com. Pleas. Bigger, J.

Sec. 2003. Negligent driving of automobile as forbidden by statute constitutes manslaughter.

One who wilfully drives an automobile in a public street of this state at a rate of speed or in a manner expressly forbidden by statute, and thereby causes the death of another, or one who, with reckless disregard for the safety of others, so negligently drives an automobile in a public street as to cause the death of another is guilty of criminal homicide, or manslaughter.¹

¹ Approved in State v. Campbell, 82 Conn. 671, 18 Ann. Cas. 236, 74 Atl. 927, 135 Am. St. 293.

Sec. 2004. Contributory negligence of deceased no defense in manslaughter caused by neglect of driver of automobile.

Contributory negligence, as such, is not available as a defense in a criminal prosecution for a homicide caused by the [gross and reckless misconduct of the accused] or [violation of a duty required or imposed upon the driver of an automobile by the statute of this state]; although the decedent's behavior is admissible in evidence, and may have a material bearing upon the question of the defendant's guilt. If, however, the [culpable negligence] or [acts in specific violation of the statute concerning the running of the automobile] is found to be the cause of the decedent's death, the former is responsible under the criminal [law] or [statute], whether the decedent's failure to use due or ordinary care contributed to his injury or not.¹

¹ *Schultz v. State*, 89 Neb. 34, 130 N. W. 972, Am. Ann. Cas. 1912, C. 495 and note, p. 501.

CHAPTER CXVII.

MARRIAGE.

(See BREACH OF PROMISE.)

SEC.

2005. What constitutes marriage.

2006. Common law marriage.

2007. Legitimacy of children.

SEC.

2008. Marriage in another state
forbidden by laws of
such state—Followed by
cohabitation.

Sec. 2005. What constitutes marriage.

In the case of *Stowell B. Dudley v. Lucius M. Warren, et al.* (title in supreme court), the trial court refused to give certain requests as to what constitutes a valid marriage, and the circuit court reversed the trial court for error in its action in refusing requests, holding that:

“The court erred in refusing to charge the jury as requested by the plaintiffs, that, in determining the fact whether M. W. and E. W. were husband and wife, the jury are not authorized to determine that question upon the evidence of repute alone, but are to determine it by all the evidence submitted to them by the court, giving to all of such evidence such weight as in their judgment it is entitled.”

The judgment of the circuit court was affirmed by the supreme court without report.¹ We give the requests which were refused by the trial court, and which should have been given.

“If the jury find that E. W. and M. W. (openly and mutually entered into a contract to become husband and wife, and thereafter) cohabitated together through a series of years as man and wife, that E. took and bore the name of W. in the communities in which they resided together, that the children of E. were deemed by M. W. to be his children, and were acknowledged by him to be such; that M. W. bore himself towards said children

as a father; that they were educated, supported, and provided for by him as his children; if the jury further find that E. and M. conducted themselves toward each other as man and wife, and that the relations between them were apparently respectable and orderly, then a presumption of marriage between the parties arises, and these circumstances are sufficient to warrant an inference by the jury of a marriage between E. and M. W.

“In determining the fact whether M. W. and E. W. were husband and wife, the jury are not authorized to determine that question upon the evidence of repute alone, but are to determine it by all the evidence submitted to them by the court, giving to all of such evidence such weight as in their judgment it may be entitled.

“To constitute a valid marriage in the State of Ohio no ceremony or form of celebration of marriage is required.

“In the State of Ohio the mutual consents of the parties then to become husband and wife, interchanged between themselves and followed by cohabitation, is sufficient to constitute a marriage.

“It is not necessary in order to prove a marriage that an actual exchange of consents be proven to have taken place between the parties, but the jury may presume that consents were exchanged if the relations existing between a man and woman are apparently matrimonial.”²

¹ See 27 W. L. B. 272.

² The part of the charge inserted in parenthesis probably cures a defect in the request and under *Carmichael v. State*, 12 O. S. 553, is good. See *Johnson v. Dudley*, 4 Oh. Dec. 243, 248, holding that where parties originally came together under a void contract, the marriage may be proved by acts of recognition, cohabitation, birth of children.

Sec. 2006. Common law marriage.

You are all aware of the usual and ordinary form by which marriages are celebrated, and of such marriages there is little trouble as to proof. But while marriages are usually celebrated in this formal manner, the law says that marriages may be con-

summed without such formal ceremony, and if the necessary requisites exist to constitute such marriages then it is a marriage, a good and binding one. How may a marriage be consummated without the usual form? I say to you if a man and woman agree to be husband and wife, and live together as husband and wife, hold themselves out to the world as husband and wife, and thereby acquire the reputation in the community as being husband and wife, the law recognizes them as husband and wife, though there never was any formal ceremony—that is, the law says that marriage is a civil contract, and that a man and woman may between themselves enter into such a contract, and if they do so enter into such a contract and live together as husband and wife, the law recognizes them as legally husband and wife, and children born to them would be legitimate children.¹

“A simple agreement between one man and one woman, who may lawfully so contract, that they will take one another as husband and wife thenceforth, and that they will sustain this relation thenceforth so long as they both shall live, the mutual understanding that neither one nor both can rescind the contract or destroy the relation followed by cohabitation; when they do this, they are married. And their marriage is just as valid in Ohio, as though a chime of bells played a wedding march, and a half dozen bishops and clergymen assisted at the celebration before a thousand people.”²

¹ E. P. Green, J., in *Stowell B. Dudley v. Lucius M. Warren*, supreme court, No. 2871.

² Approved in *State v. Miller*, 12 O. C. C. 62, 66.

There is no subject fraught with so much uncertainty as to what constitutes a valid marriage. Blackstone says: “Any contract made, *per verba de presenti* (by words of the present time), or by words in the present tense, and in case of cohabitation *per verba de futuro* also (by words of future acceptance) between persons able to contract, was before the late act deemed a valid marriage to many purposes, and the parties might be compelled in the spiritual courts to celebrate it in *facie ecclesiae*.”

Kent says: “No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required, and a marriage is said to be a contract

jure gentium (by the law of nations), that consent is all that is required by natural or public law." *Nuptias non concubitus, sed consensus facit.* ("Consent, not consummation, maketh the marriage.") "This (says Kent) is the language of the common law and canon law, and of common reason." This language would indicate, therefore, that consent merely is sufficient to constitute a marriage, and that if parties consent and then cohabit, that that constitutes marriage.

Blackstone's language indicates that consent by words of the present tense, without a formal ceremony, would constitute a lawful marriage, and as would also by words of future acceptance, followed by cohabitation. And Kent's Commentaries seem to agree with that law. He says (p. 86, 2 Vol.): "If the contract be made *per verba de presenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by cohabitation, or consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) can not dissolve, and it is equally binding as if made in *facie ecclesiae*." This was the doctrine of the common law, and also of the canon law, which governed marriages in England prior to the marriage act of 26 George II.

There seemed to have been considerable conflict between the civil and ecclesiastic authorities in some of the English cases, the intervention of a priest and a formal ceremony being assumed to be a material circumstance, while on the contrary it was considered in other cases that a promise to marry followed by cohabitation, and where there was no illicit intercourse, and it was perfectly clear that a marriage was intended, was a valid marriage. Shelford on Marriage and D., 29, 989.

Again the rule of the common law seems to have been that it was not necessary that the consent should have been given in the presence of a clergyman in order to give it validity, though it was considered a very becoming practice, and suitable to the solemnity of the occasion. The consent of the parties could have been declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage could have been inferred from cohabitation and reputation as husband and wife, except in cases of civil actions for adultery, or in public prosecutions for bigamy or adultery, in which cases actual proof of the marriage was required. Kent's Com., p. 88.

Blackstone, it will be remembered, says that consent in words of the present tense, or acceptance in the future, followed by cohabitation, for many purposes constituted a valid marriage. This statement of Blackstone was very thoroughly considered in Ohio in the case of *Duncan v. Duncan*, 10 O. S. 186, in which Brinkerhoff, C. J., said: "What these many purposes for which a marriage *per verba de futuro* were valid were, does not seem very clear; and whatever

they might have been, it seems now to be pretty well settled that they did not embrace a right to dower on the part of the wife, not the right to administer on his estate, or to her property, on the part of the husband, nor the legitimacy of the offspring, nor the avoiding of a subsequent marriage pending the first."

This view by the Ohio Supreme Court is supported too by some of the old English cases. So that after all, with all of the uncertainty which seems to exist in the English law, and the looseness of the common law on this subject, it seems that although we many times see the statement that cohabitation will constitute marriage, or will evidence marriage, even though it did, there were none of the usual incidents or rights consequent upon such marriage, so that there would be really no marriage without some sort of a formal ceremony. And the statement is made in a note to Kent's Commentaries that "if it was held by the House of Lords that by the law of England, even before the marriage act, a contract by words in the future was never a valid contract of marriage; that the civil contract and the religious ceremony were both necessary to a perfect marriage by the common law." Citing *Catherwood v. Calson*, 13 M. & W. 261.

In another note in Kent, p. 87, citing the case of *Beamish v. Beamish*, 9 H. L. C. 274, it is said: "In England it is settled that to constitute a valid marriage by the common law, it must have been celebrated by a clergyman in holy orders."

In the case of *Holz v. Dick*, 42 O. S. 23, the parties were married in due form of law but without the consent of the parents, and it was held that where such a marriage was followed by cohabitation after the age of consent, it then constitutes a valid marriage. A marriage good at common law is good unless the statute contains express words of nullity, 12 O. S. 555. A marriage not in accordance with form, but where they openly and mutually consent to a contract of present marriage, and thereafter cohabit, constitutes a marriage. *Carmichael v. State*, 12 O. S. 553. See *Johnson v. Dudley*, 4 Oh. Dec. 243, 249.

Sec. 2007. Legitimacy of children.

In order to make children of parents who have not been formally married legitimate the parents must live together as husband and wife—a man and woman may live together and raise a family of children and such children be illegitimate bastards—it is not the living together and raising of children that make the children legitimate, but it is living together as *husband* and *wife*, and not living together in a state of fornication. It is living together as *husband* and *wife*, holding

themselves out to the world as husband and wife, having the reputation in the community of being husband and wife. The law presumes that all children are legitimate, presumes that a man and woman would not live together in a state of fornication, but this presumption will not make children legitimate. To make them legitimate they must be born to persons living together as husband and wife. If persons live together as husband and wife, holding themselves out to the world as such, and having the reputation of being husband and wife, then the children born to them would be legitimate, although there had been no marriage, no formal ceremony of marriage.¹

¹ E. P. Green, J., in *Dudley v. Warren*, unreported, Sup. Ct.

Sec. 2008. Marriage in another state forbidden by laws of such state—Followed by cohabitation in Ohio.

If you find that such marriage did take place in Alabama, it being admitted that such marriage between a master and his slave—it being admitted that E. was at that time the slave of M.—was forbidden by the laws of Alabama and is null and void, yet if they, M. and E., live together as husband and wife in the State of Alabama, and children were born to them, and though these children would be illegitimate and bastards, if you should further find that they afterwards lived in Ohio together as husband and wife, under the rules that I have given you, then the children so born in Alabama would be legitimate by the subsequent marriage of their parents.¹

¹ E. P. Green, J., in *Dudley v. Warren*, *supra*.

CHAPTER CXVIII.

MASTER AND SERVANT—NEGLIGENCE OF MASTER.

SEC.

2009. General duty of master to servant.
2010. Master must exercise ordinary care in selecting servants.
2011. Duty of railroad company to use reasonable care to furnish adequate number of competent employes to manage engine and train.
2012. Whether failure to furnish adequate number of employes is proximate cause of injury.
2013. If servant knew there was an inadequate force of employes and continues in service, he assumes risks.
2014. Duties of master—Assumption of risk—General scope and extent of doctrine.
2015. Servant assumes risk of negligence of fellow servant.
2016. If master uses ordinary care in selecting servant, who subsequently becomes incompetent, knowledge of master essential.
2017. Servant does not assume risk of negligence of incompetent servant already in service.
2018. Servant does not assume risk of negligence of one occupying relation of principal.
2019. Insufficient force—Risk assumed when.

SEC.

2020. Fellow servants—Who are—When one placed in control of another.
2021. Rules for determining who is co-employe or vice principal—Brakeman and foreman.
2022. *Respondeat superior*—Disregard of orders of superior servant—Effect of.
2023. Fellow servant—Conductor and brakeman.
2024. Relation between engineer and train dispatcher.
2025. Acts done by servant at request of fellow servant—Liability of master.
2026. Obvious dangers—Acts done by order of superior servant.
2027. Warning of danger by fellow servant.
2028. Knowledge of danger unknown to master—When danger known to servant.
2029. Knowledge of dangerous methods amounts to acquiescence and assumption of risks.
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2031. Duty of railroad conductor.
2032. Railroad company deemed to have knowledge of defect—Burden of proof on company to rebut.
2033. Duty of railroad company as to inspection—Defect in brake-staff.

SEC.

2034. Burden of proof of contributory negligence on defendant unless plaintiff's own testimony raises inference.
2035. Contributory negligence considered with reference to directions of master.
2036. Contributory negligence of servant of railway when slight as compared with negligence of master—Present statutory rule.
2037. Servant injured while working on derrick car—Negligence by running engine into same—Without disconnecting machinery on such car.
1. Law of another state governs—Negligence of fellow servant.
 2. Duty of master to provide safe place to work.
 3. Contributory negligence.
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 5. Proximate cause differentiated from concurrent negligences.
2038. Death of engineer from derailment of train.
1. General duty of plaintiff.
 2. Defendant not an insurer—Ordinary care required.
 3. Rule of ordinary care varies under circumstances.
 4. Negligence must cause injury.
 5. Excessive speed as cause of derailment of train.
2039. Failure to warn and instruct and to sufficiently light machinery—Injury to servant in operating power shears.

SEC.

1. Statement of claims.
 2. Burden and degree of evidence.
 3. Failure to observe ordinary care by either party constitutes negligence.
 4. Proximate cause.
 5. Plaintiff's own evidence, raising inference of negligence.
 6. Whether defendant required to warn plaintiff, for jury.
 7. Rule of law as to obvious danger.
 8. Duty to light machinery.
2040. Injury caused by defective guy supporting derrick.
1. Statement of claim—Defective guy.
 2. Defect, defective, meaning.
 3. Knowledge of defect—Reliance upon promise to repair.
 4. Appliance of simple construction—Rule to be applied—Risk assumed.
 5. Reliance on promise to repair only when servant has limited knowledge; or where some measure of skill required.
 6. Instructions given by master—Effect of disobedience by servant.
2041. Railroad company may make rules governing conduct of employe—Duty of employe with reference to.
2042. Liability of railroad company for violation of rules by employe.
2043. Measure of damages.
2044. Injury to child of employe.

SEC.

2045. Joint occupancy of sidetrack
by two companies.

SEC.

2046. Relation of servant and
agency may be inferred
from facts and circum-
stance.

Sec. 2009. General duty of master to servant.

The relation between the plaintiff and the defendant was that of master and servant, and the law imposes certain duties upon each of the parties to that relation—both upon the master and also upon the servant. It was the duty of the railway company—the master—to use ordinary and reasonable care in providing for its employes a safe and suitable place in which to do their work; and ordinary and reasonable care is such care as ordinarily prudent persons or corporations are accustomed to exercise under the same or similar circumstances. The company is not required to use extraordinary care, nor is it required to do what is unreasonable or impracticable, taking into consideration all the circumstances. The company does not guarantee the absolute safety of its employes; it is not an insurer of its employes. It is required only to use what would be reasonable care under all the circumstances of the case.

You will first determine from the evidence how the injury occurred.

Sec. 2010. Master must exercise ordinary care in selecting servants.

The defendant is not bound to warrant the competency of its servant to discharge his duties, but only bound to exercise ordinary care in employing and retaining him. The duty of the company was to exercise ordinary care in the selection of its employes; or take that care which ordinarily prudent men are accustomed to exercise in their own affairs under similar circumstances. They are held to this degree of care, and this only.

If the jury find this defendant company did exercise ordinary care and caution at the time of employing B., the engineer, to ascertain whether he was competent or not, and did find him

fully competent to discharge his duties as an engineer, then said company had the right to presume that he would continue competent until the contrary was known to them.¹

¹ As to degree of care required in selecting servants, see *Mobile, etc., R. R. Co. v. Thomas*, 42 Ala. 459; *Cooley on Torts*, 659 (558); *Wood on Railroads*, sec. 389.

Sec. 2011. Duty of railroad company to use reasonable care to furnish adequate number of competent employes to manage engine and trains of cars.

It was the duty of the railroad company to use ordinary and reasonable care to furnish an adequate number of competent employes to properly manage the engine and train of cars upon which the plaintiff was working; that is, it was the duty of the company to use such care in that respect as ordinarily prudent persons or corporations engaged in like business usually exercise under the same circumstances. And the question now for you to determine from the evidence is: did the company exercise such care? Were the engine and train of cars in question furnished by the company with a sufficient number of employes who were charged with the duty of coupling cars and otherwise properly handling the train, and who were competent and were expected to perform these duties? If this engine and train of cars were so furnished with an adequate number of such employes, then the company is not chargeable with fault for omitting to send out upon the engine upon the morning of the injury, in starting from —, a conductor and brakeman. The inquiry is: whether, at the time of the injury, the engine and train were sufficiently and properly manned for the purpose of performing all the duties that usually appertain to the operating and managing an engine and train under such circumstances. If this engine and train of cars was so adequately and sufficiently manned, then, of course, the company was not negligent in that respect.

Sec. 2012. Whether failure to furnish adequate number of employees is proximate cause of injury.

(a) Same continued —Must be proximate cause of injury.

But if you find from the evidence that the train was not furnished with an adequate force of men, you will then inquire whether the failure to furnish this train with an adequate force of men caused the injury. To make the defendant liable for the injury, the inadequate force of men must have caused or occasioned the injury, and it must be the proximate cause of the injury. And this is a question of fact for you to determine from all the evidence in the case. Was the failure to equip this train with an adequate force of men, if such failure existed, the immediate and proximate cause of plaintiff's injury? If the plaintiff was without fault in attempting to make the coupling of these two cars, and he was injured by reason of the failure of the company to furnish an adequate force of men to properly protect him against injury—such as by giving signals to the engineer, or otherwise—then the failure to furnish an adequate force of men was the proximate cause of the injury. But if the injury did not result from the absence of a sufficient force of men, naturally and in the usual course of events, or if the company could not reasonably have anticipated that in consequence of the absence of sufficient force the plaintiff would receive an injury, then the absence of such force was not the proximate cause of the injury. Of course, as you will readily see, it would make no difference what fault the company committed with reference to this force of men, unless such fault directly contributed to produce the injury, and, as I have said, it is a question of fact which you must determine from all the evidence in the case.

Sec. 2013. If servant knew there was an inadequate force of employees, and continues in service, he assumes risks.

(b) Same continued—Knowledge of plaintiff.

But it is claimed by the defendant that, even if the force of men who were operating this train of cars was inadequate, the

plaintiff, under the circumstances of this case, took upon himself the risk of injury from that cause, and can not now hold the company responsible for an injury received from that cause. That is the claim on the part of the defendant.

The rule upon that subject is this: If the servant of a railroad company has a full knowledge of any omission of duty or neglect on the part of the company, and with such knowledge—notwithstanding such knowledge—continues in the service of the company without making any objection, or without using any exertions to have the omission of duty or neglect remedied, he thereby takes upon himself the risk of injury arising from such neglect and waives the right to recover of the company for the injury.

The jury is instructed if they find from the evidence that the plaintiff, upon the day in question, proceeded on his train as fireman, knowing that there was no conductor or brakeman in charge of the train, and that he would be required to perform the duties ordinarily performed by such conductor and brakemen, then he assumed all the extra risks incident to such employment, and thereby waived any obligation on the part of the company to furnish a conductor and brakemen for such train.

If the plaintiff knew when he started on this train on the morning in question that there was no conductor and brakemen in charge of the same, and that he would be required to do the duties of a brakeman, he had a right to abandon the service and refuse to proceed without such conductor and brakemen, and his refusal to do so, and his election to proceed without such conductor or brakemen was a waiver on his part of any obligation of the company in that regard, and the plaintiff in such case would not be entitled to recover on that account.¹

¹ Pugsley, J., Penn. Co. v. Hinckley. Affirmed by circuit court.

Sec. 2014. Duties of master—Assumption of risks—General scope and extent of doctrine.

The defendant owed certain duties to the plaintiff, his employe. If he failed in the performance of those duties, then,

as a matter of law, he would be negligent, and the question of the defendant's negligence depends whether it performed the duties imposed upon it by the law. When the plaintiff entered into the employ of the defendant he assumed all the ordinary risks and dangers of his employment, which would include the risks and dangers which may be occasioned by the carelessness or neglect of a fellow employe.¹ But the plaintiff did not, when he entered the services of the defendant, assume the risks and dangers occasioned by the carelessness or negligence of the defendant. Or, to restate the proposition, he did not assume the dangers or risks incident to the failure upon the part of the defendant to perform duties it owed to its employe. And if the plaintiff's injury in this case was the result of the ordinary risks and dangers of his occupation, then he could recover no damages for such injury, for the simple reason, gentlemen, that no person would be in fault. If his injury was caused by the ordinary risks and hazards of his occupation, it would be a mere accident—the defendant not to blame and the plaintiff not to blame. But if the plaintiff's injury was occasioned by the negligence or carelessness of the defendant, then he may recover, unless his own carelessness or negligence in some way contributed to his injury.

Now, the defendant owed the duty to the plaintiff to exercise ordinary care by furnishing safe tools and implements for his use, and having a proper place in which to prosecute his work, and a reasonably safe means of access to and from his work. If the defendant failed in any of these particulars, and by reason of such failure plaintiff was injured, then plaintiff would be entitled to recover, unless you should find that plaintiff's negligence or carelessness contributed in some way to his own injury.²

¹ 1 C. C. 359, 23 W. L. B. 436, 33 O. S. 468, 2 C. C. 3.

² From *Bellaire Nail Works v. Morrison*. Supreme Court, unreported, No. 2902. Affirmed.

Sec. 2015. Servant assumes risk of negligence of fellow servant.

It is a general rule of law that a servant, by entering into his master's service, assumes all the risks of that service which the master can not control, including the risk arising from the negligence of his fellow-servants. He assumes the risks of the negligence of the men employed with him in a common service—co-employees—engaged in a common employment, where the one is not in superior authority to the other.¹

¹ Danger not inherent in the work, and not in the manner of doing it, is not assumed, 47 O. S. 207. All risks not inherent in the work must be notified to him by the master, 23 W. L. B. 436, 27 W. L. B. 267. Only ordinary risks are assumed, 1 C. C. 359, 23 W. L. B. 436.

Sec. 2016. If master uses ordinary care in selecting servant, who subsequently becomes incompetent, knowledge of master essential.

It is the law that the company, acting in good faith and exercising ordinary care and diligence in the employment of B.; exercising that degree of care that ordinarily prudent men are accustomed to employ under like circumstances, if these men employed this man to do this particular duty on this day in the belief that he was competent to do it, and in doing that exercised ordinary care in selecting him to do that, and it turned out upon this particular day, and the transactions that occurred there indicated incompetency, if they had no knowledge of his incompetency, the company would not be at fault, even though he proved to be incompetent. Of course after he had been in the employ of the company, in order to determine if it was apparent to the company that he was incompetent, by his methods of transacting the business imposed upon him; if this became apparent in the discharge of his duties, that he was incompetent, then it would follow that they had knowledge and would have to govern themselves accordingly.

If the jury find that engineer B. was a competent employe at the time he entered the service of this defendant company, but that he afterwards became incompetent, still, unless the railroad company had knowledge of such incompetency, it is not liable for injuries inflicted by said B.'s want of care to his fellow-servants.¹

¹ From *The Cleveland, Lorain & Wheeling R. R. Co. v. Pulley*. Supreme court, unreported. Affirmed. Stone, J.

Sec. 2017. Servant does not assume risk of negligence of a servant incompetent when entering employment.

One of the exceptions to the general rule that the servant, when entering his master's employment, assumes the risks arising from the negligence of his fellow-servants is where the employer has in his service persons who are incompetent to discharge the duties imposed upon them.

Sec. 2018. Servant does not assume risk of negligence of one occupying relation of principal.

The plaintiff, in accepting the employment or service as a brakeman in the defendant's railroad company, assumes the risk of injury from dangers ordinarily incident to the business, and the risk of danger from the negligence of his co-employes, but he does not assume the risk of danger to him from the negligence of those who occupy the relation of principal to him in his service and employment by the defendant.¹

¹ *Waight, J., in C. A. & C. Ry. Co. v. Sharp*. Supreme court, unreported. Affirmed.

Sec. 2019. Insufficient force—Risk from assumed, when.

"It is the duty of a railway company to furnish the necessary and proper number of hands for the safe management of its trains, and for a delinquency in this particular the conductor of a train has a right to decline his charge, or refuse to run the train. But when he takes the charge and runs the train

for a length of time, without a sufficient number of hands, he voluntarily assumes the risk and waives the obligation of the company in this respect as to himself, and if injured by means of such delinquency on the part of the company, he is without a remedy against the company for damages.”¹

¹ *Railway Co. v. Barber*, 5 O. S. 542.

In *Ry v. Barber*, *supra*, the court say on page 560: “The company did not insure him (employee) against accident, or those unforeseen perils which due and proper care and diligence could not provide against. Injuries from accidents, which the utmost stretch of human skill and foresight can not provide against, are incident to all situations and conditions in life. And because one person is in the employ of another in a hazardous business it does not follow that the employer must stand responsible for damages resulting from injuries received through accidents which a proper degree of skill and diligence can not guard against.”

And in *Ry v. Knittal*, 33 O. S. 468, the court say: “The employee of a railroad company takes the ordinary hazards of the service, also such risks as arise from his own negligence or that of his fellow-servants.”

Sec. 2020. Fellow-servants—Who are—When one placed in control of another.

All who serve the same master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades and departments of it, are fellow-servants. Where different persons are employed by the same principal in a common enterprise, and no control is given to one over the other, no action can be sustained by them against their employer on account of any injuries sustained by one agent through the negligence of another. But when one servant is placed by his employer in a position of subordination, and is subject to the orders and control of another, and such inferior servant, without fault, and while in the discharge of his duties, is injured by the negligence of the superior servant, the master is liable for the injury.

¹ *Green, J., in The C. A. & C. Ry. Co. v. Umstead*. Supreme court, No. 2481; *Cooley on Torts*, 662 (560); *Jaggard on Torts*, 240.

Sec. 2021. Rules for determining who is co-employe or vice-principal—Brakeman and foreman.

But if you find that either of these persons were negligent in the discharge of their duty, then you will consider and determine whether the one you find was so negligent was a co-employe of the plaintiff, or occupied the position of vice-principal, so far as the defendant was concerned, in the plaintiff's employment by him. And the rule by which you are to determine whether he was a co-employe or vice-principal depends upon whether or not, under their employment by the defendant, the foreman actually had power or authority to direct and control the services of the plaintiff in his employment by the defendant. If he has this authority from their employer, then the former stands in the place of said employer as to the plaintiff, and if he is negligent, and his negligence results in injury to the plaintiff, the employer, the defendant in this case, would be liable. If he had no such authority, actual authority or power to direct and control these services of the plaintiff upon behalf of the defendant, but they stood equal in that regard, and they would be co-employes, and the defendant, the company, would not be liable for the negligence of either resulting in injury to the other.¹ Now, gentlemen of the jury, under these instructions, it is for you to determine, from the testimony in this case, whether or not this man J., the foreman of the brakemen, as he was designated in the proof, occupied this position of authority by reason of his employment by the defendant. If he did not, then the defendant would not be liable, even though he was negligent; if he did occupy this position of authority over the services of the plaintiff, then, if he was negligent in the performance of his duties, the defendant would be liable, unless the plaintiff was guilty of contributory negligence.²

¹ To constitute the relation of superior and inferior servant, the latter must be under the orders of the former. *Jenkins v. R. R. Co.*, 17 O. S. 197.

² *Waight, J., in C. A. & C. Ry. Co. v. Sharp.* Supreme court, unreported. Judgment affirmed.

It has been uniformly held in Ohio, that where one servant is placed in a position of subordination to and subject to the orders and control of another servant of a common master, and the subordinate servant, without fault of his own and while in the performance of his duty, is injured through the negligence of the superior servant while acting in the common service, an action lies in favor of the inferior servant so injured against the master. *L. M. R. R. Co. v. Stevens*, 20 O. 415; *C. C. & C. R. R. Co. v. DeKeary*, 3 O. S. 208, 209 and 210, 17 O. S. 211, 36 O. S. 221, 224, 226, 38 O. S. 389.

“Whether an engineer, or employe of a railroad company, has authority to direct or control other employes of the same company, is a question of fact to be determined in each case. This may be done, however, either by proof of express authority, or by showing the exercise of such authority to be customary, or according to the usual course of conducting the business of the particular company interested, or of railroad companies generally.” *Railroad Co. v. Margrat*, 31 W. L. B. 247; *Railway v. Lewis*, 33 O. S. 196.

Sec. 2022. Respondeat superior—Disregard of orders of superior servant—Effect of.

Further, if you should find that, at the time of the accident, C. willfully disobeyed or disregarded the order or admonition of a servant superior to himself, that is, a servant under whose control he was, and to whose orders and directions he was made subject in the discharge of his duty, and such order pertained to his safety and such disobedience contributed at the time to his death, the plaintiff can not recover.¹

¹ *R. de Steiguer, J., in Cook v. C. H. V. & T. Ry.*, 51 O. S. 636.

Sec. 2023. Fellow servants—Conductor and brakeman.

If C. was actually subject to the control and direction of B., as conductor, in the discharge of his duties as brakeman, then he was not the fellow-servant of the conductor, but the conductor was the superior servant of C., and the acts of the conductor and his orders and directions, in the discharge of his duties as such, would be acts of the defendant.²

² *R. de Steiguer, J., in Cook v. C. H. V. & T. Ry.*, 51 O. S. 636.

Sec. 2024. Relation between engineer and train dispatcher.

The defendant from the statement of its claim says that if there was any negligence, it was the negligence of a fellow-servant, and for this it would not be liable, and this brings you to the consideration of the question as to whether or not the assistant train dispatcher or the operator at P. were the fellow-servants of the engineer R.

Upon this question you are instructed that if you find that the defendant had at that time committed and entrusted the entire charge of its business with regard to the making and transmitting the order for the moving train—to the assistant train dispatcher, or to him and the telegraph operator jointly, and exercised no discretion or oversight over them, or either of them, in regard thereto, then the act or acts of the one or both, as you may find this business to have been thus entrusted to the one or both, would be the act or acts of the defendant, and if the one or the other, or both, to whom you may have found this particular business to have been entrusted by the defendant, did not act with ordinary care in the making and transmitting of the order to the conductor and engineer of train —, and the injury to R. resulted directly therefrom, and R. himself was in exercise of ordinary care, then for such negligence the defendant would be liable. But if you find that the defendant did not so entrust its business, and this particular business, to the assistant train dispatcher, or the telegraph operator, or to either or both of them, then, as to the one or both as you may find to whom the defendant had not thus entrusted this particular business, the relation of fellow-servant would exist between such one or both and the engineer R., unless you find that they, or either of them, had authority from the defendant to control his movements in regard to this train, and had the right to order him in regard to its movements, and did so order him, and the train was moved, and for the want of care of such a fellow-servant to whom this business was not so entrusted, and who had not the authority to order, and did

not so order, the conductor and engineer, the defendant would not be liable.¹

¹ Johnston, J., in *Rogers v. P. L. E. R. R. Co.*

**Sec. 2025. Acts done by servant at request of a fellow-servant
—Liability of master.**

The court instructs the jury if they find from the evidence that the said M. was working at one place in said mine, and was requested by a fellow-servant to go to another place in said mine to assist said fellow-servant in putting up said post, and while so assisting said fellow-servant, received the injury of which he complains, then the plaintiff can not recover, for a servant can not recover for an injury incurred in assisting a fellow-servant, either voluntarily or on the request of such servant.¹

¹ From *Morris Coal Co. v. Mitchell*, supreme court. Affirmed. *Huffman, J.*, given by request. *Osborn v. Knox R. R.*, 28 Am. Rep. 16.

Sec. 2026. Obvious danger—Acts done by order of superior servant.

If the jury should find from the evidence that the said J. M. was ordered by his superior servant to do an act that is *obviously* dangerous, and which, when done, was the cause resulting in the injuries of which he complains, this would not render the defendant liable, for the liability of the defendant is conditional upon the exercise of reasonable and proper care. In order for the plaintiff to recover for the negligence of the defendant by its servants, M. must have been free from negligence contributing to the injury of which he complains.

If the jury find from the evidence that, at the time said M. attempted to assist to pull up the post that had been knocked down, it was obviously rash and dangerous for a man exercising ordinary care and prudence to do so, and the danger was plain and apparent to plaintiff; plaintiff was not obliged to obey an order to do a rash and dangerous thing, and if he did so, under those circumstances, although ordered so to do by a

superior servant, and in so doing contributed to the injury of which he complains, the plaintiff can not recover.¹

¹ From *Morris Coal Co. v. Mitchell*, supreme court. Affirmed. Huffman, J., given by request.

Sec. 2027. Warning of danger by fellow-servant.

If the jury find from the evidence that the plaintiff was warned by his fellow-workman not to attempt to perform the service by which he was injured, and that plaintiff, by the exercise of ordinary care and prudence after receiving such warning, had time to escape from such danger and avoid receiving the injuries of which he complains, and plaintiff disregarded such warning and was injured, he can not recover, for I charge you if you find such to be the fact, that plaintiff would be guilty of contributory negligence by his own fault to the injuries for which he seeks to recover damages from the defendant.¹

¹ From *Morris Coal Co. v. Mitchell*, supreme court. Affirmed.

Sec. 2028. Knowledge of danger unknown to master—When danger known to servant.

I say to you further that no recovery can be had against the master where the cause of the injury, of whatever nature, was unknown to the master, and could not have been known in the exercise of ordinary care. And, furthermore, no recovery can be had where the source of danger is known to the servant, and he, without communicating his knowledge to the master, continues in his service. In such case he is presumed voluntarily to assume the risk, and he can not recover unless it is made to appear that he informed the master of the facts, and continued in his service on the faith of a promise that he would remove the danger by remedying the defects.¹

¹ *Nye, J., in C. L. & W. R. R. v. Nehl*, supreme court, 4187. Judgments affirmed.

Sec. 2029. Knowledge of dangerous methods amounts to acquiescence and assumption of risks.

“If it be conceded that the switching of cars from the main track to a side track while the train is in motion is a dangerous mode of doing business and ought to be regarded as evidence of negligence, still all employes who entered the service of the company with full knowledge that such was the practice, or acquired such knowledge afterwards, and remained in the service without the least objection thereto, and fully acquiesced therein, must be regarded as having consented to the practice or as having waived any objection thereto, and therefore as having taken the risk upon themselves.”¹

¹ Railroad Company *v.* Knittal, 33 O. S. 468.

Sec. 2030. Knowledge of work and assumption of risks.

If the jury find from the evidence that the said J. M. entered the employment of the defendant to perform the work of a miner, and he had “knowledge of the kind of work he was to perform, then he assumed the ordinary risks and dangers of the service, and he accepted the service subject to such risks thereto.”¹

¹ From Morris Coal Co. *v.* Mitchell, supreme court. Affirmed. Huffman, J., given by request.

Judgments of common pleas affirmed and charge approved, 27 W. L. B. 347. Knowledge of danger is not negligence *per se*. 4 Am. & Eng. Enc. of Law, p. 35, n. 2. City of Circleville *v.* Thorne, 1 O. C. C. Rep. 359.

Sec. 2031. Duty of railroad conductor.

It is the duty of the conductor to use ordinary care in the discharge of the duties of his employment. If he has charge and control of this train of the defendant, and has power to direct and control the services of the plaintiff on behalf of the defendant, then his duty would be to exercise ordinary care in the discharge of these duties; and ordinary care means the care that a person of ordinary prudence would use under the

same or similar circumstances. It is for you to say, from the testimony in the case, whether or not the conductor exercised this ordinary care in the discharge of the duties of his employment. If he did, that is the extent that the law requires of him, and the defendant would not be liable. If he did not, and his failure to exercise this ordinary care resulted in injury to the plaintiff, and he occupied such a position as the court will hereafter define in the employ of the defendant, as would make the defendant liable to the plaintiff for his negligence, then they would be liable. This is for you to determine from the testimony. If you find that he exercised this ordinary care, then your verdict should be for the defendant, so far as this charge of negligence is concerned in the defendant. If he failed to exercise this ordinary care, and it produced the injury to the plaintiff, then your verdict should be for the plaintiff, unless you find for the defendant on other grounds.¹

¹ Waight, J., in *C. A. & C. Ry. Co. v. Sharp*, supreme court, unreported. Judgment affirmed.

Sec. 2032. Railroad company deemed to have knowledge of defect—Burden of proof on company to rebut.

Under a statute in force in this state at the time of this accident, and applicable thereto, it is provided:

“If the employees of any railroad corporation shall receive any injury by reason of any defect in any car or locomotive, or the machinery or attachment thereto belonging, owned and operated, or being run and operated by such corporation, such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is so sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state, brought by such employe, or his legal representative, against any railroad company for damages on account of such injuries so received, the same shall be *prima facie* evidence of negligence on the part of such corporation.”

So that if it shall have appeared to you that Mr. J.'s death occurred as a proximate result of a defect which existed in this brake-rod, which caused it to break, and produced the injuries causing such death at a time when he was acting as the employe of defendant company, then the company is deemed to have had knowledge of such defect at and before the time of such injury, and the fact of such defect is *prima facie* evidence of negligence on the part of defendant company, which simply means that, in the absence of any other evidence in the case bearing upon the knowledge of defendant company, it would justify and require the jury to presume that in the respect pointed out defendant was negligent. This presumption which arises under the circumstances named, however, is no more than a presumption which may be met and overcome by other proofs advanced. If such presumption arises, then upon the question as to whether defendant company actually knew, or by the exercise of ordinary care could or ought to have known such defect, or to put it the other way, whether or not defendant company was negligent, the burden of proof is upon defendant company to overcome such presumption or inference of negligence, not that the company would be required to satisfy you that it was not negligent, but to show, having fairly weighed all the proofs, that it probably was not negligent.

Sec. 2033. Duty of railroad company as to inspection—Defect in brake-staff.

The company owed the duty to its employes to exercise vigilance in using ordinary care to maintain, and in maintaining, the car and its appliances, and keeping the same in reasonable repair, and in the performance of this duty it must exercise ordinary care in adopting means of inspection, with a view of determining its condition, and must supply itself with facilities for making repairs from time to time when needed. If the jury find that the railway company had in its employ an adequate force of careful and competent car inspectors, at various places along its line, through which this car in the course

of traffic passed, and whose duty it was, and who did, upon the arrival or departure of said car, inspect the same by a careful examination and attention to it, with a view of determining any visible or apparent defect in said car or its equipments, and if you find that sufficient instructions were given to said inspectors as to what to do in their work, and that such instructions and method of work were enforced by the company, and if you find that shortly before this accident the car was inspected in this manner by a careful and competent inspector in the employ of the — R. R. Co., and this defect in the brake-staff was not discovered by said inspectors, or reported to the company, and that said company had no knowledge, through any of its agents or officers, of the crack or flaw in the brake, that then the defendant has performed its duty to decedent in that regard.

Now, this has a meaning that may not be clearly apparent to you in some respects. It was not sufficient that the company should supply a sufficient number of competent inspectors. The company's duty went further and required of it when it supplied the inspectors to also use reasonable care in furnishing them reasonably sufficient instructions as to the due performance of their duties. It would not be a sufficient compliance with its legal duty for the railway company to provide sufficient competent inspectors and leave them to the performance of their duties without reasonable instructions as to their duties to enable them to reasonably accomplish the object intended, to-wit: The exercise of ordinary care to ascertain the condition of the machinery. True, if the inspectors actually performed the duty of ordinary care required of the company as to inspections, it would not matter that the company had failed to furnish proper instructions.

You will bear in mind that for the mere neglect of duty on the part of the inspectors the defendant company would not be liable because such inspectors are fellow-servants with J.; that is, if you find it was the duty of the car inspector, in the event that there was anything in the appearance or condition

of the visible portions of the brake-staff to raise a doubt as to the soundness of the hidden portions, to examine said hidden portion for possible defects, and if you find that there was, at the time of the last inspection of said car, anything in the condition of the visible portions of said shaft or rod which would raise a doubt in the mind of a competent inspector as to the soundness of the hidden portion thereof, and the inspector failed or neglected to examine the same, and by reason of his failure so to do the car was passed into J.'s hand, and so caused his death, for the negligence of said inspector there can be no recovery against defendant.

Still, if the inspector's mode of examination was a negligent one, but it was made in the manner directed by the company, or with the full knowledge of the company how it was made, and that manner was negligently defective, the defendant would be liable for such negligence.

In its rules established as to inspections, and the means provided for duly carrying them out, to the effect of reasonably accomplishing the legal end of a due performance of its duty, the company was bound to be vigilant in taking all reasonable precautions; that is, it was bound to exercise that degree and kind of care which ordinarily prudent persons are ordinarily accustomed to exercise under the same or similar circumstances, which you have the right to know and consider how such matters are regulated and carried on by other railways; the rule given you does not mean that if other railways engaged in similar business are accustomed to perform their duties in this respect in a negligent manner, that such fact would justify this defendant in a similar negligence.

The objective result of this rule desired to be reached is that, in the operation of the road and the performance of the duty by the employe, he shall be as reasonably safe personally as vigilance in the exercise of ordinary care for his safety on the part of the company ordinarily can render him.

Nor is the mere exigency of their traffic any excuse relieving a company from the due exercise of ordinary care in maintaining

their machinery in a reasonably safe condition. But whether or not such due care is exercised must be determined, having in mind, together with the other evidence bearing thereon, the uses made of such machinery in the company's traffic, and giving due consideration to the exigencies thereof, and the natural manner in which such ordinary care could be reasonably exercised, considering the surrounding situation and the reasonable performance by the company of its duties to the public as a common carrier, and its other operations in carrying on its railway and business.¹

¹ George F. Robinson, J., in *The P. & L. E. R. R. Co. v. Johnston's Admr.*, S. C. 4351. Affirmed by circuit and supreme courts.

Sec. 2034. Burden of proof of contributory negligence on defendant unless plaintiff's own testimony raises inference.

The burden of proof, as I have said to you, to show negligence upon the part of the company is upon the plaintiff. The burden of proof to show contributory negligence upon the part of the plaintiff is upon the defendant, unless, from the plaintiff's own testimony, it may fairly be inferred that he was negligent. If, upon the plaintiff's own testimony, a presumption may fairly arise that he was negligent, then the burden is upon him, the plaintiff, to remove that presumption.

In determining whether the plaintiff contributed to his injury by his own want of care, you will consider what he knew, or should have known, as to the condition of the roadbed, and as to whether or not the spaces between the ties were filled; what he saw at the time of the injury, or should have seen; the manner in which he did his work, and all the circumstances and surroundings.

If you find that the plaintiff was without fault, and that his injury was caused by the alleged negligence of the company, you will then render a verdict in his favor.

Sec. 2035. Contributory negligence considered with reference to directions of master.

But it should be remembered that where the injured party acts in obedience to the direction of his master, or his superintendent, who has authority to control the conduct of the employe, and he is thereby injured in so doing, his obedience to said directions will not be deemed such contributory negligence as would defeat an action, unless the danger was so obvious as to make his obedience under the circumstances unreasonable, having reference to his personal safety and the authority of the master. If the defendants, or their superintendent, which is the same thing, induced the plaintiff (or decedent) to act in the manner he did, and the injury resulted thereby, and the plaintiff's (or decedent's) obedience in that respect was not unreasonable under the circumstances, they can not successfully set up such acts as a defense.

Under such circumstances you are instructed that the contributory negligence can not be imputed to the plaintiff (or decedent) if he acted in good faith and reasonably under the circumstances and pursuant to the express instruction of his master, or of his duly authorized superintendent. It appears to the court to be grossly inconsistent for the defendant to direct the decedent to do certain acts or to perform certain services in the line of his duty to them, and then be permitted to assert that the obedience to such orders was negligence on his part that would defeat an action to recover damages resulting from injuries caused thereby, if the plaintiff (or decedent) acted reasonably under the circumstances.¹

¹ Voris, J., in *Quinn v. Ewart*, Summit Co. Com. Pleas.

Sec. 2036. Contributory negligence of servant of railway when slight as compared with negligence of master—Present statutory rule.

If you find that both plaintiff and defendant were guilty of negligence, you will then be called upon to determine, by virtue of this statute, which negligence was greater, that of defendant

or of plaintiff. Section 9018 of the code now provides that in actions by an employe against a railroad company for personal injury, the fact that the employe was guilty of contributory negligence shall not bar a recovery when such negligence was slight and that of the employer greater in comparison. So that if you find that the negligence of plaintiff was slight as compared with that of defendant, and that its negligence was greater, your verdict should be for the plaintiff, but in such cases this statute provides that the damages must be diminished by the jury in proportion to the amount of negligence attributable to such employ.

If the negligence of the plaintiff, the employe, was greater than that of the defendant, this statute would not apply. Therefore, this is the conclusion of the court, if under any circumstances—if it should appear in the evidence in this case that the negligence of the plaintiff was greater than that of the defendant, then, of course, the ordinary rules of evidence would apply irrespective of this statute, and the jury would in that event be called upon to determine what, as in the ordinary run of cases irrespective of this statute you would be called upon to determine what the proximate cause, or direct or immediate cause of the injury was, whether it was the negligence of the plaintiff or that of the defendant.¹

¹ *Banner v. The C. C. C. & St. L. Ry. Co., Franklin Co. Com. Pleas. Kinkad, J.*

**Sec. 2037. Servant injured while working on derrick car—
Negligence by running engine into same—
Without disconnecting machinery on such
car.**

1. *Law of another state governs—Negligence of a fellow-servant.*
2. *Duty of master to provide safe place to work.*
3. *Contributory negligence.*
4. *Concurrent negligence.*
5. *Proximate cause differentiated from concurrent negligence*

1. *Law of another state governing.* The injury complained of occurred in the state of Montana, by the laws of which state the rights of the parties must be determined. That state is governed by the common law touching this question. Under the common law it was the duty of the master, and it was the duty of the defendant in this case, to use due and ordinary care in the selection of servants, and to furnish proper means and appliances for carrying on the work, and to furnish a safe place to work. If the master, the defendant in this case, performed this duty, it was not liable for injuries to plaintiff as a servant caused by the negligence of a fellow-servant engaged in the same general business. The master can not be held to be an insurer of the safety of the servant, being bound only to the observance of ordinary care for his protection. The negligence of a fellow servant is one of the risks incident to the employment which the servant assumes at the time he enters the employment.

The claim of the plaintiff is that he and the defendant's servants were not fellow-servants, but the latter was the vice-principal of defendant company, representing it, and performing its duties at the time. The defendant claims that plaintiff and P. were fellow-servants, that plaintiff assumed any risks from negligent acts of P., and if the latter was guilty of any negligence proximately causing his injury, that it is not responsible therefor, and consequently it can not be held liable in this case.

It is made clear therefore, that the jury should decide this question first.

The law by which you will determine this fact will be given you by the court by the application of which to the evidence the jury will make its decision. The common law, and the law of Montana, is, that all who serve the same master, work under the same control, derive authority and compensation from the same source, and directly co-operate with each other in the particular business, and neither one of them are invested with a power of control in the conduct and management of the business of the master so as not to be clothed with, or not to be empowered to perform, the master's duties, or who does not have general

charge of the construction work, or the general control over the tools and machinery, and the places of work, or the hiring and discharging of employes, are to be considered fellow-servants.

On the other hand, a vice-principal is one with whom the master invests the general charge, control and supervision over a particular work being carried on by the master, conferring upon him entire charge and control over the property, and the employes, with power to hire and discharge, and with power over the tools and machinery, and complete charge of construction work in hand in the absence of the master. A person with such powers is to be regarded as a vice-principal, and a direct representative of the master, for whose negligence in the conduct of the work and business within the line of his duty the master is responsible.

If the jury find that P., the servant of the defendant, did not have control, management and supervision over the work in question on behalf of the defendant company, that he did not have the selection of the employes of defendant engaged in this particular work, that he was not invested with control and management of the property of defendant, of its employes, of its tools, machinery, and did not have complete charge of the construction of the work in hand, but that he was a mere foreman with power to direct a gang of men, including plaintiff, in a mere separate piece of work in one of the branches of service of defendant, then the jury should find P. to be a fellow-servant of the plaintiff and not a vice-principal of the defendant, and that it is not responsible for any negligence of P., if any the jury may find.

But if the jury finds that P. was a fellow-servant, and that as such he was guilty of negligence in any of the particulars charged, causing injury to plaintiff, under the rule of law that a servant assumes the risks incident to the negligence of his fellow-servant, your verdict should be for the defendant and against the plaintiff.

But if, on the other hand, the jury finds that the defendant placed P. in the control, management and supervision of the work in question, in the absence of defendant, with power to select servants, with general power over the tools, machinery and appliances, and of the furnishing of a place for the plaintiff to work, then the jury would be justified in concluding that the defendant is responsible for any negligence which it may find P. to have been guilty of, as charged in the petition, if it proximately caused the injury complained of. If the jury should so find, then your attention is directed to the specific charges of negligence contained in the petition.

2. *Duty of master to provide safe place to work.* It was the duty of the defendant to use ordinary care to furnish plaintiff a safe place to work. Whether defendant did this is a pure question of fact for the jury to determine from the evidence. The defendant was not an insurer of the safety of the plaintiff, being bound merely to use ordinary care in placing him at work, and in the inspection of the machinery, looking to the safety of the plaintiff while at the work assigned to him, as well as ordinary care in directing the movement of the car on which plaintiff had been assigned to, and was at work, as well as to use ordinary care in giving reasonable warnings to plaintiff of the intention to move the car while the latter was at work thereon, so as to avoid injury to him. You will also determine whether the defendant exercised a power of control over the engine used in moving the car on which plaintiff was working. You will look to the evidence and determine under the instructions, whether defendant used ordinary care in the particulars named, or whether it failed to do so, and was negligent. If you find that the defendant was not guilty of the negligence in any of the particulars alleged, that will be the end of your deliberation, and your verdict should be for the defendant. But if you find that the defendant was guilty of negligence in the particulars charged, or in any one of them, you will then determine whether such negligence on the part of the defendant proximately caused the injury to plaintiff.

3. *Contributory negligence.* It is charged by the defendant that if it be found that it was negligent in any of the respects alleged in the petition, that the plaintiff himself was guilty of negligence which directly contributed to and was the proximate cause of his injury. It is averred that plaintiff assumed an unsafe position while working on the engine; that he failed to observe the danger which was obvious and incident to the work; that if the car was in gear when he went to work he was guilty of negligence in failing to observe that fact, and that he failed to observe ordinary care for his own safety.

In other words, it is charged that plaintiff was guilty of contributory negligence. Contributory negligence can operate to defeat plaintiff's recovery for the negligence of the defendant only when it directly and proximately causes the injury; or when both plaintiff and defendant were guilty of negligence, and the negligence of both of them directly contributed to cause the injury complained of.

The burden of proving contributory negligence is upon the defendant, unless the evidence introduced by plaintiff himself tends to show that the plaintiff was guilty of negligence. If contributory negligence is suggested by plaintiff's own evidence, then the burden is on him to remove the suggestion or inference, and show himself blameless to the jury. If it is not so suggested by plaintiff's own evidence, then the burden of establishing it rests upon the defendant, which he must do by a preponderance of evidence.

Plaintiff can not recover compensation for an injury which he might have avoided by the use of ordinary care and prudence under the circumstances. So if the plaintiff did not take reasonable care under the circumstances, and he thereby proximately caused the injuries, he can not recover. All that the law requires of the injured party in this respect is that he should act with reasonable care and prudence under the circumstances known to him, considering the means of knowledge he had, the nature of the work which he had been performing for the

defendant, and his knowledge and familiarity with the machinery and appliances about which he was set to work, and his previous opportunity, and his opportunity at the time, to learn thereof, his inexperience, intelligence, and judgment as you may find them to be from the evidence.

4. *Concurrent negligence.* If you find that both plaintiff and defendant were guilty of negligence, and that the negligence of both was contemporaneous and continuing until after the injury, and that the negligence of each was a direct cause of the injury, without which it would not have occurred, the plaintiff may not recover, and your verdict should be for the defendant. But if you find that the negligence of the plaintiff, if he was guilty of negligence, was not contemporaneous and continuing, as stated, you will then determine whether the negligence of plaintiff or of the defendant was the proximate cause of the injury. The law regards the proximate cause attaching legal consequences thereto. Consequently the jury must understand the meaning of the term.

5. *Proximate cause differentiated from concurrent negligence.* The proximate cause of an injury is that cause which in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred. Under the rules given the jury concerning the alleged negligence of both plaintiff and defendant, the jury is instructed that if it should find that the plaintiff was guilty of negligence in any of the particulars charged, and that the defendant was also guilty of negligence, but that the negligence of plaintiff was not contemporaneous nor continuing with that of the defendant, and that the plaintiff's negligence, without the intervention of the negligent act of the defendant, would not have produced the injury, and that the negligence of the defendant in such case was a new and independent cause, without which the injury would not have occurred, and that the same produced the injury, your verdict should be for the plaintiff.

But if you find that the negligence of the plaintiff was not concurrent with that of the defendant, and that there was no intervening, new, or independent negligence of the defendant, which produced the injury, but that the negligent act of the plaintiff produced the injury, your verdict should be for the defendant.¹

¹ *Madison v. Pittsburg Const. Co., Franklin Co. Com. Pleas, Kinkead, J.*
Case affirmed by circuit and supreme court.

Sec. 2038. Death of engineer from derailment of train.

1. *General duty of plaintiff.*
2. *Defendant not an insurer—Ordinary care required.*
3. *Rule of ordinary care varies under circumstances.*
4. *Negligence must cause injury.*
5. *Excessive speed as cause of derailment of train.*

1. *General duty of defendant to plaintiff.* I will first state to you, gentlemen of the jury, the general rule of law as to the duty which the defendant owed to the plaintiff's decedent. It was the duty of the defendant to exercise reasonable and ordinary care to furnish the plaintiff's decedent a safe place to work, and safe machinery, tools and appliances with which to do his work. That rule required of the defendant that it should use ordinary care for the safety of the plaintiff's decedent.

2. *Defendant not an insurer—Ordinary care required.* The law does not make the defendant an insurer of the safety of its employes so that a liability is not established against it upon making proof merely that its employes suffered an injury while in its service and in the course of his employment, but the rule required at its hands that it should use that degree of care for his safety which persons of ordinary care and prudence are accustomed to exercise under like circumstances and conditions. So that if you find in this case, gentlemen of the jury, that in the respects in which the plaintiff claims the defendant was guilty of a want of care for the plaintiff's decedent, it did use ordinary care for his safety, as I have defined ordinary care,

but that notwithstanding such ordinary care on its part for his safety, the accident occurred, then the plaintiff is not entitled to a verdict at your hands, and your verdict should be for the defendant.

3. *Rule of ordinary care varies with circumstances.* But if you find that the defendant was negligent in some one or more or all of the respects alleged in the amended petition, and that this negligence—this want of ordinary care—was the proximate cause of the derailment of the train and the consequent death of plaintiff's decedent, then the plaintiff is entitled to a verdict at your hands. I have just said to you, gentlemen of the jury, that the rule of duty which the defendant owed to the plaintiff's decedent was to use ordinary care—that is that degree of care which persons of ordinary care and prudence are accustomed to exercise under like circumstances and conditions. This is always the rule which measures the duty of the master to his servant, but when this care is called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous. This is so because ordinarily prudent and careful persons, having in view the object to be attained, and a just regard for the rights of others, are, under circumstances of peculiar peril, accustomed to exercise greater care than where the circumstances are less perilous. The amount of care is increased where the peril is greater, and in proportion to the increase of the peril, but the rule or standard remains the same, that is, ordinary care under the circumstances of the particular case.

4. *Negligence must cause injury.* No presumption of negligence arises against the defendant from the mere fact that the train was derailed. The plaintiff alleges in her petition that the accident happened by reason of the concurrence of several causes, and that these causes were due to negligence or want of due care on the part of the defendant. Negligence may consist either in doing something which ought not to have been done, or in omitting to do something which ought to have been done.

To entitle the plaintiff to recover, it must appear from a preponderance of the evidence, that is, the greater weight of the evidence, that the defendant was negligent in one or more or all of these respects alleged in the petition, and that this negligence on the part of the defendant was the proximate cause of the derailment of the train. But it is not essential to a recovery on her part that the evidence shall establish that the defendant was guilty of negligence in all of the respects alleged in the petition. It is sufficient if the proof establishes the fact that the defendant was guilty of negligence in one or more of these respects, provided it also appears from a preponderance of the evidence that the negligence established was the proximate cause of the derailment of the train. By proximate cause is meant the direct cause producing the injury as distinguished from the remote cause of the injury.

5. *Excessive speed as cause of derailment of train.* The petition also charges that the derailment of the train was in part due to the excessive speed at which the train was being run at the time of the accident, and it is charged that this speed was due to the order and direction of DeV. and E., who are alleged in the petition to have been superior authority over the plaintiff's decedent, and with power and authority to direct and control his conduct, that the plaintiff's decedent was not familiar with the operation of the engine, and did not have any knowledge of its operation in the passenger service, nor with the speed which it could safely develop, and that this was known to the defendant, and that DeV. and E. were placed on the train for the purpose of directing the plaintiff's decedent in the operation of the train. If you find that the engine was being run at the time of the accident by E., the road foreman of engines, and that the derailment was due to the excessive and dangerous and negligent rate of speed—that is, to such a rate of speed as amounted to negligence on his part under the rules which I have stated—or that it was due to the negligent and dangerous rate of speed combined with other acts of negligence charged in the petition against the defendant, then the defendant will be liable.

But if you find the rate of speed was not excessive, dangerous and negligent under all the circumstances and conditions disclosed by the evidence, then there can be no recovery against the defendant upon that ground, and that is true whether the engine was being run by E. or by the plaintiff's decedent under the orders of E.¹

¹ *Milbourne, Admr. v. The Hocking Valley Ry. Co., Com. Pleas Court, Franklin Co., O. Bigger, J.*

Sec. 2039. Failure to warn and instruct servant and to sufficiently light machinery—Injury to servant in operating power shears.

1. *Statement of claims.*
2. *Burden and degree of evidence.*
3. *Failure to observe ordinary care by either party constitutes negligence.*
4. *Proximate cause.*
5. *Plaintiff's own evidence raising inference of negligence.*
6. *Whether defendant required to warn plaintiff for jury.*
7. *Rule of law as to obvious danger.*
8. *Duty to light machinery.*

1. *Statement of claims.* The particular acts of negligence charged against the defendant are:

First. That it failed to instruct and warn plaintiff of the dangers of said work.

Second. That defendant failed to provide a safe place to work in that it was not sufficiently lighted for him to see how to do the work with safety.

These two claims are the only ones submitted to the jury.

The defendant denies that it was negligent at all, and claims that if it was guilty of any negligence as alleged by plaintiff, the injury sustained by the plaintiff was caused by his own negligence, the alleged negligence contributing proximately to his injury consisting in his act of placing himself and remaining, without necessity, in a position of obvious danger, by placing

his hand and allowing it to remain in a place and position of obvious danger when it was not necessary so to do, so that by the usual operation of the power shears in cutting the rails, plaintiff was injured.

By reply plaintiff denies that he was negligent thus causing his injury.

2. *Burden and degree of evidence.* The burden is upon the plaintiff to prove that defendant was negligent as charged, and that the same caused the injury to him. This must be done by preponderance of the evidence; that is, the greater weight thereof.

The credibility of the witnesses, the credit and weight to be given them is within your exclusive province.

3. *Failure to observe ordinary care by either party constitutes negligence.* The failure to observe ordinary care in performing the duties required by the circumstances in this case respectively of plaintiff and defendant would constitute negligence.

The rule of ordinary care required of the parties in this case must properly be what is reasonably and ordinarily required by the nature of the case and such as the circumstances reasonably and ordinarily called for. Anything less than this must be regarded as negligence, and whenever such negligence of the one or the other parties in failing to observe the care required of each of them produces the injury, this furnishes the basis of legal responsibility.

4. *Proximate cause.* The act of but one party can constitute the proximate cause of injury to which the law attaches legal consequences.

If the defendant was negligent, and its negligent acts and not those of plaintiff, produces the injury, then the verdict may determine its legal liability.

Though the defendant be negligent, still if the plaintiff himself be negligent, and it be found that his own negligent conduct and not that of the defendant, directly caused the injury, then the verdict will be that he is entitled to no relief.

5. *Plaintiff's own evidence raising inference of negligence.*

If plaintiff's own evidence raises an inference that he himself was negligent, the burden is on him to remove this suggestion, and show himself free from negligent acts producing his own injury. If there be no such inference of negligence, then defendant must show such contributory negligence on the part of plaintiff as directly caused the injury, this to be made to appear by a preponderance of evidence.

6. *Whether defendant required to warn plaintiff for jury.* The court submits this case to the jury for it to decide whether under the circumstances of this case, ordinary care required defendant to notify, instruct or warn plaintiff of any dangers arising from the operation of the machine, and whether the defendant used ordinary care in lighting the machinery so as to enable the plaintiff to do the work in safety.

If there was any danger arising from the operation of the machine in this case the question for the jury to decide is whether it was apparent or obvious or hidden.

Whether there was an obvious danger in the operation of the machine is a question which the jury must determine before deciding whether any warning or instructions were necessary to be given by the defendant to plaintiff, and the failure to give the same was negligence.

7. *Rule of law as to obvious danger.* Where a danger in the operation of machinery is obvious it will be presumed that an adult servant of ordinary intelligence, whether he speaks and understands our language or not, may be capable of learning and knowing the usual or ordinary apparent dangers arising therefrom. If the dangerous condition be such as would be apparent to an ordinarily intelligent, casual observing, prudent person, or such as may be readily seen and observed by him.

The master owes no duty whatever to give instructions or warning to such person, or to no one else in the case of an obvious danger in the operation of machinery, unless it be to one who is inexperienced, if such danger may not be obvious to one without such experience.

The duty to give instructions or warning to the plaintiff was not incumbent on defendant in this case, unless there was danger in the operation of the machine known to defendant, or which ought to have been known to it, unless it appears that by reason of the inexperience of the plaintiff the defendant had reason to believe the plaintiff did not know and would not discover it in time to protect himself from injury. [9 O. C. C. 680.]

If it appear that there were elements of danger in the operation of the machinery which were or ought to have been obvious to this plaintiff, and that he had average intelligence or capacity, though without much experience, using due care to appreciate, learn and know of such dangers, and that he ought to have known thereof, and that ordinary prudence on his part would enable him to avoid injury, then in such case, no warning would be necessary.

8. *Duty to light machinery.* It was the duty of the defendant to use ordinary care in lighting the machinery considering the nature of the work and the machinery, in a reasonably sufficient manner to enable the plaintiff, himself using due care, to do his work in safety.

If the jury find that no warning or instructions were necessary to be given plaintiff, according to the law given you in this charge, and you further find that there was adequate light, your verdict should be for the defendant.

If warning and instructions should have been given, and were not given, and the place was not sufficiently lighted to enable plaintiff to do his work safely, himself using reasonable care, and he was injured by reason of the neglect of the defendant in these particulars he is entitled to your verdict.¹

¹ Franklin Co. Com. Pleas. Kinkead, J.

Sec. 2040. Injury caused by defective guy supporting derrick.

1. *Statement of claim—Defective guy.*
2. *Defect, defective, meaning.*
3. *Knowledge of defect—Reliance upon promise to repair.*

4. *Appliance of simple construction—Rule to be applied—Risk assumed*

5. *Reliance on promise to repair only when servant has limited knowledge or where some measure of skill required.*

6. *Instructions given by master—Effect of disobedience by servant.*

1. *Statement of claim of negligence.* The sole charge of negligence is that one of the guys supporting the derrick was defective in that the same was pieced with a chain which contained an open link.

Negligence being the omission to use such care as ordinarily prudent persons use under the same or similar circumstances, ordinary care in this case would be such care as those persons who are engaged in the business of operating derricks for this purpose, or similar purposes, are accustomed to exercise in the manipulation and operation of such instrumentalities.

Repeating now the charge of negligence, that one of the guys supporting said derrick was defective in that the same was pieced with a chain which contained an open link; that plaintiff notified defendant of such defective guy and of its dangerous condition, which defect said defendant promised to make safe, and that said injuries were caused by the negligence of the defendants in not repairing the said defective guy.

There is some difficulty in interpreting the language of plaintiff so as to arrive at his meaning wherein he charges the defect in the guy. The plaintiff, remember, must recover, if at all, only upon the theory of his allegations and upon the grounds of negligence alleged, and upon no other.

The question is whether the petition charges that the guy was defective in that it was merely pieced with a chain instead of all being cable—that is, whether the defect charged is that the guy was pieced with a chain rather than of being cable, or whether no complaint is made as to the use of the chain, but rather that the complaint is that the defect charged was that an open link was used in the chain. The claim of the plaintiff,

as shown by the evidence, seems to have been based upon an interpretation of the pleading that the defect in the guy consisted in the use of the chain rather than the particular defective link in it. One thing is certain, gentlemen, defective appliances is the gist or basis of this charge.

2. *Defect, or defective, meaning.* The defect alleged in the derrick being that the cable was pieced with a chain which contained an open link, I can only aid you, gentlemen, in arriving at your conclusion by instructing you that "defect" or "defective," as used in the averment by the plaintiff, is, in law, or may be considered, in law, as a charge of the absence of something necessary for completeness or perfection; it includes the idea of a fault or want of perfection in the construction of the guy, which impairs or weakens it and renders it unsafe for the use for which it is intended. The charge of defectiveness made in the pleading excludes the idea of the mere use of an appliance such as is ordinarily used by ordinarily prudent persons familiar with and skilled in the use of such instrumentalities under similar circumstances and for similar purposes. That is the best that I can do, gentlemen, in the way of explaining to you this allegation, and I have carefully marked out to you what I think it includes, and what it excludes, so that you would have no difficulty in looking to the evidence and determining the ultimate fact as to whether or not there was any negligence.

You will proceed by the application of these rules touching the matter of defects and determine whether the derrick and guy were defective in the manner charged by the petition and as construed, defined and explained by the court, or whether they were constructed in a manner as are used by ordinarily prudent persons using similar instrumentalities. If you find that they were and that there was no defective link, as charged, then your verdict should be for the defendant.

3. *Knowledge of defect—Reliance upon promise to repair.* If, however, you find that the guy was defective in the manner charged, then you will proceed to the further consideration of the conduct of plaintiff himself, for the purpose of determining

whether his conduct was such as in law and in fact entitled him to recover. Plaintiff avers that he learned of the alleged defective guy, that he called the attention of the defendants to such defects, and that defendants promised to remedy the same. Plaintiff claims that he continued on in his work without the defect complained of by him having been remedied, relying upon the promise made by defendants to have remedied the alleged defect.

4. *Appliance of simple construction—Rule to be applied—Risk assumed.* The rule of law governing this phase of the question in controversy is as follows: If the appliances or instrumentalities are of simple construction and the complainant, the plaintiff here, was engaged in ordinary labor, using such appliances or instrumentalities, that is of simple construction, and he was entirely familiar with the same, understanding them as fully as did the master, then the plaintiff must be held to have assumed the risk incident to their use, and in such case he can not recover.

5. *Reliance on promise to repair only when servant has limited knowledge, or where some measure of skill required.* The servant, the plaintiff in this case, was warranted in relying upon the alleged promise of defendants to repair, if one was made, and in continuing in the use of alleged defective appliances, only, if he had, I may say, a limited and imperfect knowledge thereof, and only where some measure of skill and experience possessed by persons more than one would have in dealing with ordinary tools and appliances and an ordinary workman, to enable the servant, the plaintiff here, to know and appreciate the particular defect, if there was one, and the danger incident thereto. If, therefore, you find from the evidence that the appliances or instrumentalities in this case as shown by the evidence were not of simple construction, but that it would require some special knowledge and skill to have enabled the plaintiff here to know whether a derrick constructed as the evidence shows this derrick to have been constructed, and as you find to have been constructed, and that constructed as it was it would be or was

inadequate to specially lift the logs which were being lifted at the time, you will then determine from the evidence whether the plaintiff had or had not sufficient knowledge and skill as enabled him to know and appreciate the danger incident to the continued use of the derrick. If you find that it required some knowledge and skill to know and appreciate the dangers from the derrick, if it was defective, and that plaintiff did not possess sufficient knowledge to know and appreciate the dangers incident to its use and did not know and appreciate such dangers and that he continued in reliance upon a promise made by the defendants to remedy the alleged defect and that the injury caused by the falling of the derrick was due to the alleged defective construction, then your verdict should be for the plaintiff.

You will keep in mind, however, that to warrant such a finding the derrick must not have been of simple construction and easily understood by ordinary workmen, but there must have been a defective construction, the defendants' attention must have been called thereto, and they must have promised to remedy the same, the plaintiff must have relied upon the same. You must find all these facts by a preponderance of the evidence to warrant you in finding for the plaintiff.

6. *Instructions given by master—Effect of disobedience by servant.* There has been some evidence here tending to show that certain directions were given by the master, the defendants in this case, to the workmen there engaged in working this derrick, that they should do certain things with reference to the large log. You will remember the evidence upon that. The plaintiff, you will recall, has denied any knowledge of having heard any directions given to saw the log in two before they undertook to raise it. The court says to you that if you find the men engaged in operating this derrick other than plaintiff had been instructed by the defendant not to lift the log in question until it had been cut in two, and you find that at the time of plaintiff's injury they were lifting such log without having it first cut in two, in disobedience of their instructions from the defendant,

and that such disobedience of the orders given them caused the fall of the derrick, then plaintiff can not recover for the negligence of the other employes engaged with him at the derrick in thus disobeying their instructions, because such negligence would be the negligence of a fellow servant for which the plaintiff can not recover. There would be an exception to that, however, that if they proceeded to raise this log under the directions of a foreman, who is a vice-principal in law, and represents the principal, they would be justified in acting upon his directions, and if he was careless and negligent, the servant would not be barred by that act because he represents the principal and it is the same as the principal acting himself, and if there was any negligence the plaintiff would be entitled to recover.

The damages are set forth and alleged in the petition and in the event that you find a verdict in favor of the plaintiff you will then consider the question of damages and the evidence offered in support thereof and will award to the plaintiff such damages as in your judgment will compensate him for the loss sustained. There is an allegation in the plaintiff's petition that seeks to recover the sum of \$25.00 for special damages for money expended by way of physician's services, and it is my duty to say to you that there is no evidence here to support that claim and that therefore you will disregard it.¹

¹ Franklin Co. Com. Pleas, Kinkead, J. Charge approved by circuit court.

Sec. 2041. Railroad company may make rules governing conduct of employee—Duty of employee with reference to.

“A railroad company has the right to make such rules and regulations for the conduct of its servants and agents while engaged in its service as, in its judgment, are reasonable and proper, as would conduce to the safety and comfort of its employees; and all servants, while engaged in such service, with a knowledge of such rules and regulations, are bound to act in conformity therewith; and if injuries are sustained by them while acting in violation thereof, no recovery can be had of the

company therefor, if such violation was the cause of, or materially contributed to, the injury.”¹

¹ *Wolsey v. Railroad Co.*, 33 O. S. 227. It is the duty of a railroad company to make regulations for protection of employees from dangers. *Railway Co. v. Lavalley*, 36 O. S. 221. This duty is satisfied by a reasonable provision for a particular case instead of a rule. *Railway v. Zepperlein*, 1 O. C. C. 36. The statute requires rules to be made and published. R. S., sec. 3334.

Sec. 2042. Liability of railroad company for violation of rules by employee.

“The company is not liable for an injury which happens to an employee in consequence of a disregard of its plain instructions, even though other employees also disregard the same.

“If a railroad company in the exercise of its discretion adopts a rule for the conduct of its employees while engaged in its service, and intended for their personal protection against injury, and an employee, knowing the rule, neglects to avail himself of its provisions, and in consequence of such neglect sustains an injury, the company can not be held liable therefor.”¹

¹ From *Wolsey v. Railroad Co.*, 33 O. S. 227.

An employee has no right of action against the company for an injury incurred while breaking a rule of the company. *Pilkington v. R. R. Co.*, 70 Tex. 226, 83 Ky. 589; *Wood on Railroads*, sec. 382.

Sec. 2043. Measure of damages.

The measure of plaintiff's damages is compensation for the actual injury received by him. You can not allow anything for the purpose of punishment, or by way of example. The measure of plaintiff's damages, in case he is entitled to recover, is compensation—what will fairly and reasonably compensate him for the injury, nothing more, nothing less. In determining the amount of compensation, you will consider the pain which the plaintiff has suffered, physical or mental; the nature, extent, and character of the injury; the effect of the injury upon his capacity to labor and earn a living, and all the circumstances.

Sec. 2044. Injury to child of employee.

“Although the defendant varied from the usual manner of using the track in question, yet if the plaintiff was not there as an employee of the company, but was there wrongfully, he can not complain of the negligence of the company unless the defendant’s agents knew that he was there, and wilfully injured him.”¹

“If you find that the defendant company and another company were each rightfully in the joint use and occupation of the transfer track, and the father of the plaintiff, then in the employment of the other company, duly authorized, was engaged in repairing a car upon this track; that the plaintiff brought to him his dinner, and that while engaged in repairing said car, shortly thereafter, the father requested the plaintiff child to render him necessary temporary assistance to enable him (the father) to perform the work of repairing the car, if he was thus authorized to employ the plaintiff, then the plaintiff was rightfully upon the track.”²

¹ From *Penna. Co. v. Gallagher*, 40 O. S. 637.

² From *Penna. Co. v. Gallagher*, 40 O. S. 637.

**Sec. 2045. Joint occupancy of sidetrack by two companies—
Relation of servants of one company to the
other—Injury to servant by failure to in-
spect track.**

Where a sidetrack or transfer switch is in the joint occupancy of two railroad companies, the servants of each company are not the servants of each other, nor fellow-servants with the servants of the other, but their right of recovery in case of injury caused by the negligence upon the part of the other company, in operating said track or switch, or in the carelessness of its servants, is an independent one. In this class of cases the injured person is more than a mere licensee. The relation between the railway whom he serves and the other railway is so far founded on a valuable consideration that it raises upon the

part of that other railway an implied obligation that it will not be negligent as against that servant.

Though the ——— company's cars stood on the defendant's transfer switch, through the trespass of said company, it would not absolve the defendant from the exercise of ordinary care in the proper inspection of the same as to such obstructions, and in so using said switch and handling said cars as not to injure the servants or property of said ——— company on its own railroad and premises. If you find by a preponderance of evidence that the transfer track or switch was in the joint occupancy of the two railroad companies, and the plaintiff's injury was caused by the negligence on defendant's part in not properly inspecting the said track to avoid obstructions thereon, and in handling cars found standing thereon, whereby the collision and injury occurred, your verdict should be for plaintiff, otherwise for defendant.¹

¹ Michael Bulgar v. N. Y. L. E. & W. R. R., supreme court, unreported. Judgment of circuit court reversed and common pleas affirmed, 28 W. L. B. 128.

Sec. 2046. Relation of servant and agency may be inferred from facts and circumstances.

The jury is instructed that the fact of agency as well as the powers of an agent, may be established by inference from facts and circumstances which may be proved by the evidence. It is not essential, nor it is always possible to prove an express contract of an employment in order to establish the relation of master and servant, but such relation may be inferred or implied from other facts and circumstances directly established by the evidence.

If it may be inferred from such facts and circumstances that the person who commits the injury complained of, was, at the time of the commission of the alleged wrong, engaged in the actual conduct of the business of the person charged [the defendant], and with his [the defendant's] seeming or implied consent, then under such circumstances the latter [the defend-

ant] may be held responsible for the wrong of the person directly committing the same, who may be held under such circumstances to be the agent or servant of the defendant, if such wrong was committed within the scope of the apparent scope of agency or employment.¹

So, therefore, if the jury find from the facts and circumstances, etc.

¹ Thompson on Negligence, (2d Ed.), sec. 580; *Diehl v. Roberts*, 134 Cal. 164; *Perlstein v. Express Co.*, 177 Mass. 530; *Gershel v. Express Co.*, 113 N. Y. Supp. 919.

CHAPTER CXIX.

MOB—LIABILITY OF COUNTY FOR INJURY BY.

SEC.

2047. Liability of county for injury from mob under statute.

1. Statement of claims.

SEC.

2. The statute and essential elements to recovery.

3. Essential that assault be made by mob.

4. Amount of recovery.

Sec. 2047. Liability of county for injury from mob under statute.

1. *Statement of claims.*

2. *The statute and essential elements to recovery.*

3. *Essential that assault be made by mob.*

4. *Amount of recovery.*

1. *Statement of claims and essential elements to recovery.*

He also alleges that on the ——— of ———, he was a chauffeur in the employ of The Columbus Taxicab and Auto Livery, and was driving an automobile near ——— street in said city of Columbus, Ohio; that, on that date, while he was in the peaceful pursuit of his occupation and employment, disturbing nobody, driving his automobile as stated, a collection of individuals, who had assembled there for an unlawful purpose, intending to do damage and injury to the plaintiff and others, and who pretended to exercise correctional power by violence over the plaintiff and others, without any authority of law, and contrary to law, assaulted and committed an act of violence on the plaintiff by striking him in the right leg and ankle with a large stone, whereby plaintiff was seriously injured and handicapped for manual labor and for earning a livelihood for a long time.

Plaintiff alleges that he suffered a lynching at the hands of such mob, thus unlawfully assembled for the unlawful purpose aforesaid.

Plaintiff further alleges that he was not furnished with such protection as he was entitled to by law, whereby he suffered the aforesaid lynching at the hands of the mob, as above set forth, by reason of all of which the plaintiff asks judgment against the board of commissioners in the sum of five hundred dollars, for which sum he claims the board is liable.

It is, in effect, a suit against the county, and the board of county commissioners are the representatives of the county.

2. *The statute.* The statutes of this state declare, in substance, that any collection of individuals assembled for any unlawful purpose, intending to do damage or injury to anyone, or pretending to exercise correctional power over other persons by violence and without authority of law, shall, for the purposes of the act, be regarded as a mob; and the act also provides that any act of violence exercised by them upon the body of any person shall constitute a lynching. Thus we have a definition, a statutory definition of a mob and of a lynching, to control the issue in this case.

The statutes further declare that any person assaulted by a mob and suffering a lynching at their hands shall be entitled to recover from the county, from the county in which the assault is made, any sum not to exceed five hundred dollars.

The suit in question is planted under these statutes.

The court instructs you that, before the plaintiff is entitled to recover a verdict, there are certain material allegations which must be established by the preponderance of the evidence.

First, that the plaintiff was assaulted by a mob, defining a mob, as I have heretofore defined it to you by reading the statute, or its substance; as already stated, that the plaintiff was assaulted by a mob, that is, by a collection of individuals assembled for an unlawful purpose, intending to do damage or injury to any one, or pretending to exercise correctional power over other persons by violence, and without authority of law. That is the statutory definition of a mob. Second, that the plaintiff suffered a lynching at the hands of such mob; that is, that the mob exercised some act of violence upon the body of the plain-

tiff, and as I have heretofore said to you, a lynching consists in an act of violence exercised by a mob upon the body of any person whatever. Third, that the alleged assault and lynching at the hands of said mob occurred in this county, about the time alleged in the petition. The exact time is not important. If these three essential elements are proved by a preponderance of the evidence, the plaintiff is entitled to a verdict; but if the plaintiff has failed to so prove any one or more of said elements, he is not entitled to a verdict, and the verdict should be for the defendants.

3. *Essential that assault be made by mob—Mob defined.* The court further instructs you that, while it is essential that the alleged assault, if it occurred, be made by a mob, yet, if there was a collection of individuals assembled at or near the corner of T. street and L. avenue for the unlawful purpose and intention of damaging or injuring anyone, or of exercising correctional power over others, by violence and without authority of law, and if, in furtherance of the unlawful purpose on the part of such mob, any one of said mob actually made the assault upon the plaintiff, it is a sufficient assault by the mob. In like manner, if a mob assembled at or near the corner of T. street and L. avenue, as alleged, with the unlawful purpose and intent of exercising acts of violence upon the body of any person, and one of their number at the time and place of the assemblage, in furtherance of their common design, exercised acts of violence on the body of the plaintiff, by striking him on the leg, as alleged, it constitutes a lynching by such mob.

The court further instructs you that, to constitute a mob, it is essential to prove that the collection of individuals was assembled for an unlawful purpose, as heretofore stated, or, being assembled for a lawful purpose, while so assembled, determined among themselves to do some unlawful acts.

Now, purpose or intent is an operation of the mind and is not usually proved by direct or positive evidence. Persons do not usually declare that they have assembled or gathered together for unlawful purposes, so that intent and purpose are

usually proved by indirect or circumstantial evidence. You will, therefore, in determining whether the assemblage was gathered for an unlawful purpose, or, after being gathered, determined to do an unlawful act, perform some unlawful act, consider the acts and conduct and declarations of the persons whose intent is sought to be proved, as reflecting upon the purpose and intent of the persons collected together, if there were such persons, together with all the other facts and circumstances surrounding them prior to and at the time of and subsequent to the alleged assault, if it occurred, and determine whether the collection of individuals, if assembled as alleged, were present with an unlawful purpose or intent either to damage or injure anyone, or to exercise correctional power over others, with violence and without lawful authority.

If the plaintiff was struck by a stone, as alleged, and you should conclude that the person who struck him was not a member of a mob, as I have heretofore defined it to you, but acted independently of a mob, then the plaintiff can not recover in this case, for the plaintiff recovers, under the statute, if at all, for mob violence upon him, some one of the mob who may have attacked him or assaulted him with a stone or other weapon, as the case might be. And he can not recover if it was some independent act of some person who was not acting in conjunction with some mob.

Gentlemen, the court further instructs you that, if there was a collection of persons assembled as set forth in the petition, for an unlawful purpose, either intending to damage or injure others or to exercise correctional power over others by violence and without authority of law, even though the collection of persons did not specifically intend to injure this plaintiff, if such a collection of persons did injure this plaintiff, the defendant is liable, if the mob or collection of persons had the general intent to injure persons in that immediate locality.

4. *Amount of recovery.* As heretofore stated, the action is to recover a statutory penalty for an alleged violation of certain statutory provisions, and the right to recover is based solely

upon those provisions, the penalty varying with the aggravation or enormity or veniality of the wrong, rather than the amount of any pecuniary loss which the plaintiff may have sustained, although the idea of compensation enters into the law. The court instructs you with regard to the amount of your finding, that you shall assess such amount as, in your judgment, under all the circumstances in the case, you regard as just and right, and as you believe the defendant ought to pay, not exceeding, however, in any event, the amount claimed in the petition, to-wit, five hundred dollars. This matter is left entirely to you, to exercise your own judgment under all the circumstances of this case.¹

¹ Hoover v. Gibson, *et al.*, Franklin Co. Com. Pleas. Rogers, J.

CHAPTER CXX.

MUNICIPAL CORPORATIONS—STREETS—SIDEWALKS— CHANGE OF GRADES—SEWERS.

SEC.

2048. Dedication of property for public street—Requisites of.
2049. Interest of abutting owner in street.
2050. Establishment of street by general use.
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- become serious and noticeable obstruction—Length of time allowed.
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| <p>SEC.</p> <p>2068. Change of grade—Statute as to—Requirements of owner as to claims</p> <p>2069. Change of grade—Requirements as to files and surveys—Reliance upon by abutting owner—Failure to file claim—Skill required of owner—Reliance upon information furnished by engineer.</p> <p>2070. Change of grade—Plans and profiles—Owner may rely upon information and explanations by engineer.</p> <p>2071. Change of grade—Adopting county roads as street.</p> <p>2071a. Change of grade—Improvement made before grade established is at one's own peril.</p> <p>2072. Change of grade—Rule as to unreasonable grade.</p> <p>2073. Change of grade—Whether or not premises abut upon improvements as affecting claim for damages.</p> <p>2074. Reasonableness of grade of street—What should be considered in determining.</p> <p>2075. Change of grade—Recovery of interest on damage.</p> <p>2076. Change of grade—Retaining wall—Whether necessary to protect buildings.</p> | <p>SEC.</p> <p>2077. Streets—Change of grade—Damages—A different form.</p> <p>2078. Change of grade after improvement—How proved.</p> <p>2079. Whether improvement made in conformity to established grade.</p> <p>2080. Change of grade—Damages recoverable—Injury to building—Shrubbery—Access to premises—Value before and after change.</p> <p>2081. Damages—Market value—Opinion evidence.</p> <p>2082. Damages—Enhancement of value.</p> <p>2083. Change of grade—Damages—Benefits—Access.</p> <p>2084. Damages to property owner by construction of street.</p> <p>2085. Excavation in street—Negligence in making—Signals or lights—Right of travel subject to temporary obstructions or excavations.</p> <p>2086. Obstruction of sidewalk when building.</p> <ol style="list-style-type: none"> 1. City must permit reasonable part to be used. 2. Right and duty of traveler to use sidewalk. 3. City not liable unless it had notice or knowledge. |
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Ses. 2048. Dedication of property for public street—Requirements of.

“Three things are necessary to be shown to establish its dedication. The owner must have intended to dedicate the property

for a street, and to give up his private rights in it, which are inconsistent with its use as a street by the public at large. And he must have evidenced and carried out this intention by some unequivocal act, such as throwing it open to the public, fencing it out, making or recording a plat showing it marked as a street, selling lots upon such plat, and conveying them by deeds referring to the plat. If you find that the owner so intended to dedicate it as a public street, and carried out such intention by acts necessary for that purpose, then the village council must have accepted the dedication, there being no evidence of any acceptance by the public before the incorporation of the village; and the passage of an ordinance recognizing the street and providing for its occupancy and improvement by the corporation is a sufficient acceptance of the dedication of the street by the village council, if before that time the owner, on his part, had done all that was necessary to its dedication, as before mentioned.”¹

¹ From *Railway Co. v. Village of Carthage*, 36 O. S. 631. Intention to dedicate express or implied, and acceptance by municipality are essential. *Millikin v. Bowling Green*, 3 Oh. Dec. 204 (C.C.).

Sec. 2049. Interest of abutting owner in street—Ingress and Egress.

If the lands of the plaintiff, mentioned and described, abut upon —— street, he has, in addition to the general interest which the public has in the street, an incidental title to certain facilities, easements, and franchises, one of which is the right of ingress and egress to his lot, which is as much property as the lot itself, and if you find that his lands abut upon —— street, and that this right or easement has been substantially impaired by the defendant in the location and operation of its railroad along the street, if you find it has so done, and that by the location of the railroad track by the defendant in the street in front of his premises, that he has sustained special damage by having the ingress and egress to his lot substantially impaired, you may and should take this into consideration in determining the amount to which he would be entitled.¹

¹ From *Railroad Co. v. Stubbings*, supreme court, unreported, No. 2467.

The interest of an abutting owner is a property right in the nature of an incorporeal hereditament, protected as property by the constitution. *Crawford v. Delaware*, 7 O. S. 459; *Street Ry. v. Cummins*, 14 O. S. 523. An abutter's right of access is property. *McNulta v. Ralston*, 5 O. C. C. 330. "An abutting property owner on a public street of a municipality has a right and interest in the street, in the nature of an easement, appurtenant to his lot, and as much his private property as the abutting lot itself." *Pratt, J., in Toledo Bending Co. v. Mfg., etc., Co.*, 3 Oh. Dec. 430.

Sec. 2050. Establishment of street by general use, or prescription.

In determining the lines and location of ——— street, adjoining the property of plaintiff, it is not necessary that legal proceedings should be shown to have been had to establish this street, but if you find from the testimony that the same had been in general use as a street in the city of ——— for a public road for a period of twenty-one years prior to the time the same was occupied and used by the defendant, as claimed in the petition, if you find it was so used and occupied by the defendant, this would constitute in law an establishing of the same as a public street, and would entitle the plaintiff to all the rights and the same rights therein as though the same had been regularly laid out and established by the proper authorities. And in determining the location of ——— street, you should consider only the evidence relating to the use thereof by the public, so far and to such an extent that it is proven that the same was actually and necessarily used and traveled by the public, and the fact that the public travel was diverted to the water of the canal for the mere purpose and convenience as a watering place for stock would not necessarily establish the laying out of the street upon that portion of the traveled track that was so used and only so used.¹

¹ From *Railroad Co. v. Stubbings*, supreme court, unreported, No. 2467.

**Sec. 2051. Streets may be improved to meet public needs—
Within reasonable discretion of municipality.**

Streets are essentially permanent physical conditions of city existence, and, when appropriated to the public as part of a street system, imply that as fast as the needs of the public require they will be improved in a manner adequate to reasonably meet the public requirements; but it would be unwise and frequently very oppressive to make such improvements faster than the ability of the abutting owners would make practical, and this is especially true as the more expensive permanent street improvements are paid for largely by local assessments. The fact that the municipality reasonably delays making or authorizing the expensive improvements is not to be treated as a waiver on its part of its right or intention to properly improve the street when it becomes, in its discretion, reasonably proper so to do, and as the needs of the public require; and what is reasonable is wholly within the discretion of the municipal authorities, so long as such discretion is reasonably exercised under the circumstances of the given case and within the provisions of the statute.¹

¹ Voris, J., in *Sanford v. The City of Akron*, Summit Co. Com. Pleas. Affirmed by circuit court, April term, 1896. A citizen can not control the method of improvement. *Parsons v. Columbus*, 50 O. S. 460.

**Sec. 2052. Must keep sidewalks and cross-walks open and
reasonably safe—Municipality not an insurer.**

The law requires that the city of ———, being a municipal corporation, shall have the care, supervision and control of the streets, and shall cause them to be kept open and in repair, and free from nuisance. This obligation includes, of course, as a part of the streets, the sidewalks and crosswalks, and, therefore, imposes upon the city the duty of keeping the sidewalks and crosswalks open and in repair, and in a reasonably safe and suitable condition for pedestrians passing along the same. This requires a reasonable vigilance in view of all the surroundings,

and does not exact or require that which is impracticable. When the municipal authorities have done that which is reasonable in this regard, they have discharged the entire obligation imposed by the law. It is to be said also that the city is not bound at all hazards to have knowledge of defects in sidewalks. The city is not an insurer of the safety of its public ways and sidewalks, or of the lives and limbs of persons passing over and along them. It is the duty of the city to exercise ordinary care and prudence in the taking care of its streets, and this includes sidewalks; and by ordinary care I mean that degree of care which persons, which individuals of ordinary prudence, are accustomed to use and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others, and for the objects to be accomplished. In general terms, then, such is the duty of the city in the care, supervision, control and maintenance of streets.¹

¹ Carlos M. Stone, J., in *City of Cleveland v. Storer*, S. C. 4422. See Cooley on Torts, 746 (625). A street includes sidewalks. Dillon's Municipal Corporations, sec. 780, n. The city is bound to see that the sidewalk conforms to the grade of the street. *Toledo v. Higgins*, 5 Oh. Dec. 485.

"A municipal corporation is charged with the duty of keeping its streets free from nuisance and in a reasonably safe condition for travel in the usual mode, but it is not an insurer of the safety of persons using them, and when they are in that condition it is not chargeable with negligence, although an accident happens in the use of the streets." *City of Dayton v. Glaser*, 76 O. S. 471. The fact that a portion of a plank sidewalk had been in bad condition, due to the sliding of an adjacent hillside of which the municipality had notice, does not as matter of law amount to notice of the defect causing the injury. *Scrogin v. City*, 10 C. C. (N.S.) 293. Affirmed, 87 O. S. 495.

Sec. 2053. Pedestrians to use ordinary care in passing along streets—May assume city discharged its duty.

On the other hand, it was the duty of the plaintiff as a pedestrian upon the street to exercise ordinary care in passing along the street and over this crossing—over the crosswalk—and the

same rule as to ordinary care in this instance means precisely what it means in the other. He is to exercise that degree of care that men of ordinary prudence are accustomed to use and employ. It was then his right to go along the street in reliance that the city had properly discharged its duty; he had a right to pass along the street in the belief that the city had performed its duty, and that its sidewalk was in a reasonable and suitable condition for him to pass over. That reasonable diligence on the part of the passerby along the sidewalk doesn't require that he shall be on the alert every moment searching for a defect here or there. It doesn't mean that at all; nor does it mean that he may shut his eyes and take his chances on any possible condition of things. It is not that. It is relying upon the city's keeping its streets in a reasonably fair condition. He may walk along relying upon that condition of things, that supposed condition of things; he may proceed upon the theory that the sidewalk is in a reasonably safe condition, using that care and that discretion that prudent men are accustomed to use in passing along a highway.¹

¹ Carlos M. Stone, in *City of Cleveland v. Storer*, S. C. 4422. Police power of city as to cross streets and crossings. Dillon's Municipal Corporations, sec. 393.

Sec. 2054. Defective street becomes a nuisance, when.

Now, the word "nuisance" in this provision of our statute may be defined in these words: A nuisance is something done or omitted to be done which has the effect of prejudicially and unwarrantably affecting the rights of another person, and works a damage or injury to such other person. If this sidewalk had become out of repair, was defective in the particulars claimed, if it had become dangerous, unsafe to cross over, maintained there by the city with knowledge of its defects and dangerous character, then that was the maintaining of a nuisance within the meaning of the law, and if a person was injured without

fault on his part, under such circumstances, he would have a right of action predicated upon the nuisance so maintained.¹

¹ Carlos M. Stone, J., in *City of Cleveland v. Storer*, S. C. 4422. See different form, No. 567, *post*. What are nuisances and power and duty of city to abate. Dillon's Municipal Corporations, sec. 374 and n.

Sec. 2055. When city liable for defects in streets—Constructive notice.

If you find the city had actual notice of this defect, or if such defect had existed for such a period of time as that the city, in the exercise of reasonable care, ought to have known it, the rule to be applied is as follows: If there occurs a defect in a street upon such short notice or under such circumstances as that the city had no knowledge of it, and in the exercise of ordinary care could not know it—could not be expected to know it—then no liability arises against the city for that reason. So, it is requisite as one of the things to be established, either that the city had actual notice of the defect, or that it had existed for such a length of time and under such circumstances and surroundings as, in the exercise of ordinary care, it must be held to have known it, ought to have known it, because it was bound to have known it by reason of its long existence. Notice to an officer of the city, charged with the duty of looking after these things is notice to the city. The city acts through its properly constituted officers and agents. Some have charge of one department of the city government, and some have charge of others, and so I say, notice to a duly appointed officer, whose duty it is to look after sidewalks and crosswalks, whose duty it is to see that they are kept in repair, notice to such an officer is notice to the city. And so it is notice to the municipality where the defective condition has existed for such a period of time as that, in the exercise of ordinary care, ought to have known it. That is what is known as constructive notice. It is constructive notice as distinguished from actual notice.¹

¹ Carlos M. Stone, J., in *City of Cleveland v. Storer*, S. C. 4422. As to what is notice to city of defect, see *City of Lafayette v. Allen*, 81

Ind. 166. If a city fails to keep its streets in safe condition for public use, it will be liable for any injury caused thereby. Dillon's Municipal Corporations, sec. 980.

Sec. 2056. Sidewalk in defective condition for such length of time that city presumed to know it.

You will first consider whether the sidewalk was out of repair and in such a condition as to be dangerous; then whether the city knew it. If the sidewalk was out of repair and in a damaged and defective condition, and had been for a sufficient length of time so that the city might be presumed to know of it, then the city had notice. It is not necessary to show positively that some one went to the official whose duty it was to look after these streets and sidewalks and told him about the dangerous condition of these sidewalks. But you must find, if you find there was a dangerous sidewalk, that it was so apparent that it might be observed by persons passing over it in that condition, and that it had been so for a sufficient length of time, so that it is fair to presume that the city and its officials in the course of their duty, in its care of the streets, should have known of it and had time to repair it, before you may find that the city had notice.¹

¹ Gorman, J., in *City of Toledo v. Wilhelmena Clopeck*, supreme court, unreported. Judgment affirmed.

**Sec. 2057. Not liable for mere slipperiness from snow or ice—
Otherwise if danger from want of repair was
enhanced by snow and ice.**

The city is not liable for the mere slipperiness of the sidewalk. If this crosswalk was in a reasonable state of repair, so that you are able to say that the city was without fault in the premises, then there was no negligence on the part of the city in maintaining this crosswalk or plate in the condition that it was in, and this accident nevertheless happened, if it happened because of the slippery character of the walk, resulting from this slight fall of snow during the night previous, or from sleet, or an icy condition of the walk, the plaintiff would not be entitled to

recover. But if this fall was due to the fault of the sidewalk—due to the faulty condition of it, rather—if the city was negligent in the care of it, if it had permitted it to become out of repair, to become unsafe and dangerous, and this fall was the result of that condition, and the plaintiff, without fault, received this fall because of that condition of things, then he would be entitled to recover, we think, even though that dangerous condition was enhanced by the fact that snow had fallen upon it the night before. In other words, the plaintiff is not prevented from recovering in this action, even though the slippery condition of the sidewalk incidentally caused by the fall of the snow added to the condition of things there, made it more dangerous. He is not prevented from maintaining his action if the jury find from the testimony in this case that the fall was due to the defective condition of the sidewalk, and without which defect the accident would not have happened, and if you further find, as I have already indicated, that the city had knowledge of the defective character of the sidewalk, or that it existed for such a length of time as, in the exercise of ordinary care, ought to have known it, the city would be held liable.¹

¹ Carlos M. Stone, J., in *City of Cleveland v. Storer*, S. C. 4422. As to liability for mere slipperiness, see *Chase v. Cleveland*, 44 O. S. 505; *Dillon on Municipal Corporation*, sec. 1006.

The court, in the 44th O. S. 514, upon this subject of ice and snow, says: "In all northern cities and towns storms of snow and sleet, producing ice and resulting in slippery walks, are of frequent and constant recurrence during the winter season, and accidents of the character complained of are also frequent. Such dangers are apt to exist in many places at the same time, and at points widely separated from one another. They appear at many points today, disappear tomorrow, and like dangers appear at other places the next day. They are affected by changes of weather, which are likely to occur at any time, and frequently many times within a few hours. * * * To effectually provide against dangers from this source would require a large special force involving enormous expense."

A city is not liable to one who slipped upon an icy sidewalk. *Bretsh v. Toledo*, 1 N. P. 210.

Sec. 2058. Though city not liable for mere slipperiness from ice or snow, otherwise if snow or ice allowed to accumulate so as to become serious and noticeable obstruction—Length of time allowed.

Now, it is also a well-settled rule that the city is not liable for any injury which is caused by the mere slipperiness of its streets, caused by ice or snow upon the surface of the street. This is a situation of things which is necessarily incident to winter weather, and is liable to occur during winter at any time and upon any street; and that is a condition of things that the public and persons traveling upon the street know and are bound to know, and to take into consideration; and it would be an unreasonable burden to impose upon the city to see that its streets at all times during the winter, in all places, were free from mere slipperiness. But if ice or snow is allowed to accumulate upon the street to such an extent as to become a serious and noticeable obstruction to ordinary travel upon the street, and the city, by its officers or agents, acquired notice or knowledge of such obstruction, and if, after such knowledge or notice, it is practicable, considering the means at its command, considering the time during which this alleged obstruction existed, and considering everything, if it is practicable for the city to remove these obstructions after such knowledge or notice, then it would be liable for an injury caused by such obstruction; and of course, in determining whether it is practicable or not, the jury will have to take into consideration the extent of such obstruction, and of similar obstructions throughout the city, and the means at the command of the city, and all the circumstances in evidence.

It will be the duty of the jury to examine the evidence in this case carefully, and determine just what the facts are. You will inquire whether there was a ridge of snow or ice upon the side of this street railroad track, and whether the plaintiff's horse slipped on that ridge of ice or snow—whether that was the cause of the horse's falling; and whether that ridge of

snow or ice, if it existed, was of such a character and of such an extent as to be an obstruction to ordinary travel upon the street. Was it a noticeable obstruction? Did it materially interfere with the ordinary travel upon the street? You will ascertain, if you find that such an obstruction existed as I have described, whether the city knew of it, or whether, by the exercise of ordinary care and vigilance, ought to have known of it. You may consider the length of time the obstruction had existed, if at all, in substantially the same condition it was in at the time of the accident.

Of course, if this ridge, assuming that you find that such a ridge was there, if it was substantially caused by a recent fall of snow or a recent change in the state of the weather—so recent that it could not reasonably be expected that the city would have the opportunity or the means or the ability to remove this as well as all similar obstructions throughout its corporate limits—then the city is not liable. You must look at all these matters as reasonable men, in the light of all the circumstances, applying to them your best judgment and your experience.¹

¹ Isaac P. Pugsley, J., in *City of Toledo v. Wellener*, supreme court, No. 2652. Judgments affirmed. It is the duty of a city to use reasonable diligence in keeping its streets and walks free of snow and ice. *Dillon's Municipal Corporations*, sec. 1006. Failure of the city to look after removal of snow and ice on its streets and sidewalks may be regarded as a wrongful act. *McKellar v. Detroit*, 57 Mich. 158.

Sec. 2059. Liability of municipality for injury resulting to traveler upon stone in street—Duty of traveler.

It is the duty of the defendant corporation to use reasonable care, caution, and supervision to keep its streets in a safe condition for the ordinary modes of travel, at night as well as by day, and if it fails to do so it is liable for injuries sustained in consequence of such failure, providing the party injured was exercising reasonable care and caution. Therefore, it becomes a

question of fact for you to determine in this case as to whether or not this defendant was negligent in the way the street was left at the time of the accident. If you find from the evidence that the plaintiff, while driving on the street, could see or was actually aware, because of the electric lights or otherwise, that the stone in question was in the street and obstructed it, nevertheless he had the right to continue to proceed on his way, but it was his duty in doing so to use ordinary care to avoid such obstructions or danger liable to be caused thereby, and if, while so doing, in the exercise of ordinary care, he drove against such obstruction and was thrown from his buggy and injured, the defendant would not be relieved from responsibility for such injury by reason of such attempts or acts of the plaintiff in and about attempting to proceed in his way, but in doing so he must have exercised ordinary care; failing in this, he can not recover, even should you find that the defendant was guilty of negligence. * * *

A municipal corporation is not liable for every accident that may occur from obstructions or defects in its streets. Its officers are not required to do everything that human energy and ingenuity can possibly do to prevent the happening of accidents or injury to citizens. If it exercise ordinary and reasonable care in that regard, they have discharged their duty to the public.¹

¹ Gillmer, J., in *Rosser v. Village of Girard*, Trumbull County.

Sec. 2060. City to keep sidewalks in reasonably safe condition for travel.

The court says to you as a matter of law that it was the duty of the defendant, by its proper officers and agents, to see that the sidewalks in the corporate limits of the city were in a reasonably safe condition for persons to travel over in the day-time or in the night season.

A municipal corporation, however is not liable for every accident that may occur from defects in its sidewalks or streets. Its officers are not required to do everything that human energy

and ingenuity can possibly do to prevent the happening of accidents or injuries to a citizen. If it has exercised reasonable care in that regard, and if its streets are in a reasonably safe condition, it has then discharged its duty to the public.¹

¹ Gillmer, J., in *Wallace v. City of Warren*, Trumbull Co. Com. Pleas. City will be liable for defect in street or sidewalk causing injury. Dillon's Municipal Corporations, sec. 1007. But the defect must be the proximate cause, *Id.* A municipality is not an insurer against accidents upon streets, but is held to reasonable care in keeping them free from nuisance. It is not bound to anticipate improbable or unprecedented events. *Village v. Kallagher*, 52 O. S. 183, 187, and cases cited.

Sec. 2061. Injured party to show actual or constructive notice to city.

The burden is upon the plaintiff to show by a preponderance of the evidence that the defendant had actual or constructive notice of the defect claimed in the street, before recovery can be had. Actual or constructive notice of the defect complained of must be given a sufficient length of time in order to enable it to repair the defect, if any existed.

Constructive notice would be where the defect had existed for such a length of time prior to the alleged injury that the city, in the exercise of ordinary care and diligence, would or should have known of the defect. If it should appear that the city did not know of the particular defect in the walk that caused the injury to plaintiff, but that the sidewalk generally, as is alleged and claimed, was defective, then you are instructed that in order to charge the municipality with notice of the particular defect from its knowledge of the existence of a general one, the first should be of the same character as the latter, or at least so related to it that the particular defect is a usual and concomitant of the general one. To constitute knowledge of the general defect notice of the particular one, they must at least be of the same general character, or the latter a usual concomitant of the former, and substantially at the point or place where the accident occurred.

In this case the court says to you that if you find that the city knew that the particular places across the sidewalk at the point in question were generally loose, or if you find that it knew that the stringers had become rotten so that the nails would easily draw from them, and then you further find that the plaintiff was injured on account of her putting her foot through a hole in the sidewalk, on account of one of these boards that had become loose, on account of the general character of the sidewalk, by reason of the stringers becoming rotten so that they would not hold the nails, then you are instructed that if the injury was caused in this manner, that the city might be chargeable with notice of the defects, although, in fact, it did not know that the particular hole through which the plaintiff put her foot existed at the time. If however, the general defect known to the city, if one was known, was not of the character to make the sidewalk unsafe, or was of a character totally unlike the one which caused the injury, so that the existence of one would be no presumption of the existence of another, then this would be no such notice as would bind the defendant. * * *

The defendant must have notice before there can be a recovery on the particular defects in the sidewalk which caused the injury to plaintiff.¹

¹ Gillmer, J., in *Wallace v. City of Warren*, Trumbull Co. Com. Pleas. The city is liable after notice if it refuses to act, 53 O. S. 605.

Sec. 2062. Streets and sidewalks to be kept in reasonable repair and free from nuisance—Must show actual or constructive notice.

It is the duty of the city to keep public streets and sidewalks in reasonable repair so that they shall not be dangerous to people passing thereon. They should be free from nuisance, and anything dangerous to the public and that interferes with the public convenience and safety is a nuisance.¹ And if a street or sidewalk is in such condition as to be dangerous to people passing over it, then it is a nuisance and it is one of

those things that it is the duty of the city to remedy within a reasonable time after it is known. Before you can find for the plaintiff you must find that the city knew of this defective condition of the walk, or should have known of its being in that condition and apparent, so that it could be observed by people looking at it or people passing over it, for a sufficient length of time so the city should have known of it and had time to repair it before this time when the plaintiff claims she was injured.

If you find these facts proof that there was that dangerous condition of the walk there, and it was a walk laid down by the city, in a dangerous condition, and had been in that condition a sufficient length of time so the city knew it, or should have known of it, or had it repaired; if you find the plaintiff was passing along there, and, without any fault of hers, was thrown and injured, before she is entitled to recover her damages from the city for that injury; if you do not find or did not find all those things, then your verdict will be for the defendant and that the plaintiff has no cause of action.²

¹ Municipal corporations are invested with the power and charged with the duty of keeping the streets under their control free from nuisance. *Zanesville v. Fannan*, 53 O. S. 605; *Cardington v. Fredericks*, 46 O. S. 442-47.

² Gorman, J., in *City of Toledo v. Clopeck*, supreme court, unreported. Judgments affirmed.

Sec. 2063. Latent defect—Actual notice to be shown.

“A latent defect in a sidewalk is one that does not appear to the eye, or would not appear to be known by a person walking over it. The law does not presume notice to a municipal corporation of a latent defect.

“Before a municipal corporation can be held in damages for injuries caused by a latent defect, the jury must find that the municipal corporation had actual notice of such latent defect.

“The jury must look only to the testimony as to the condition of the walk at the point at which the accident is alleged

to have occurred, and must disregard all general statements as to other walks.”¹

¹ Gorman, J., given by request in *City of Toledo v. Clopeek*, supreme court, unreported. Judgment affirmed January 22, 1895, No. 3207.

Sec. 2064. Sewer sysem—Reasonable care required in construction, maintenance and supervision—Providing safeguards to prevent backwater from sewer.

It is the duty of the city to exercise reasonable care and skill and caution in the construction, maintenance, and management of its sewer system, and if in these respects it is negligent, the city is liable for the acts of such negligence to the person so injured. Yet the city is not liable for extraordinary care or prudence, nor to provide against extraordinary contingencies; what would constitute extraordinary contingencies is a matter of fact to be determined by the jury from the evidence submitted to them. Its liability is no greater than that imposed upon private persons in like circumstances. The city is not to be held by the more stringent rule in that respect than the plaintiffs are for the safety of their own property. In determining whether the plaintiffs were guilty of negligence or not in providing safeguards to prevent backwater from the sewer, and in properly guarding their goods from injury, no higher or more stringent rule is required of them than that of ordinary care and skill and prudence, such as persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances, in order to conduct an enterprise in which they are engaged to a safe and successful termination.

Whether the failure of the plaintiffs to put in a backwater valve, if you find such to be the fact, was or was not negligence on their part is to be determined by you, under the rules given you in this charge, from all facts and circumstances proven in the case.

The law presumes a party to know what, by the exercise of reasonable care and prudence, he ought to know under all the circumstances in the case, and this is a case in which this presumption is peculiarly applicable.¹

¹ Voris, J., in *Miller v. Akron*, Summit Co. Com. Pleas. As to liability of city for overflow of sewage on private lands, see *Dillon's Municipal Corporations*, sec. 1046.

Sec. 2065. Injury from change of grade—Purpose of a view of premises.

You have viewed the premises in question in this case, but you are not to treat what you observe there as evidence; you are not to adopt your own theory or opinion as to the fact of reasonableness or unreasonableness of the extent of the improvements, or whether it was made on or above the ordinary grade, nor as to the value or extent of the injury done. These facts must be determined by the evidence. You were permitted to go and view the premises only for the purpose of enabling you the better to apply the evidence submitted to you.¹

¹ Voris, J., in *Smith v. The City of Akron*.

Sec. 2066. Change of grade within authority, and without negligence.

As a general rule, a municipal corporation is not liable for damages to property abutting upon a street, resulting from the improvement of such street, providing such improvement is made within the scope of the corporation's authority, and without negligence or malice, that is, if reasonably made. The people of Ohio have always been jealous of any encroachment on the rights of an individual. Private property is held inviolate by constitutional provision, but subordinate to the public welfare, and when taken for the public use, a compensation therefor must be made in money. Construed in the light of

these instructions to you, this constitutional provision is operative, and should be upheld in cases like the one on trial.¹

¹ Voris, J., in *Smith v. The City of Akron*.

Sec. 2067. Change of grade—Improvements made with reference to established grade—Liability for injury from change of grade.

If, however, it be shown that the city before the construction or making of the plaintiff's improvements, by ordinance duly enacted, established the grade of said street, and had so improved or appropriated the street as to indicate fairly and reasonably that no future change would be required by the city, and the plaintiff, relying upon such corporate acts as a final decision as to the wants of the public, improved her lot in a manner suitable to the established grade, and afterwards her improvements were injured by a change of the grade by the city, the rule just announced ¹ could not apply.²

If the plaintiff so made substantial improvements upon her lot with the view of such established grade and level of the street, and the city thereafter altered the grade, and dug down the street so as to materially impair the value of such improvements, the city would be liable to her for damages so far as the premises were materially injured thereby, if the evidence brings her within the provisions and limitations of the instructions given you.

¹ *Ante*, 2066.

² *City v. Penny*, 21 O. S. 499.

Sec. 2068. Change of grade—Statute as to—Requirements of owner as to claims.

The statute provides, however, as a protection to both the owner and the city, that before it can legally proceed to make such improvements as that made upon the street, the council shall declare by resolution the necessity of such improvement, and shall give twenty days notice of its passage to the owners of property abutting upon the improvement; * * * and all

plans and profiles relating to the improvements shall be recorded and kept on file in the office of the city engineer or clerk, and open to the inspection of all parties interested, and such owner claiming that he will sustain damage by reason of the improvement shall, within two weeks after the service of the notice, file a claim in writing with the clerk of the corporation, setting forth the amount of damage claimed, together with a general description of the property with respect to which it is claimed the injury will accrue; an owner who fails to so do shall be deemed to have waived the same, and shall be barred from filing a claim or receiving damages.

Sec. 2069. Change of grade—Requirements as to files and surveys—Reliance upon by abutting owner—Failure to file claim—Skill required of owner—Reliance upon information furnished by engineer.

The law that requires the owner to file his claim for damages is reasonable and founded in sound state policy. This is required among other things to enable the city council to understandingly determine whether it would be expedient to go on with the contemplated improvement, taking into account the amount of money required to be paid for damages, whether the property owners liable to pay the assessment for improvement ought to be burdened by so great an expense, and also to enable it to provide the ways and means therefor. Unless a short day were fixed, the city would be greatly embarrassed and delayed in needful improvements; this would be especially true in rapidly growing cities. But this provision of the statute can not avail the city when it has failed to serve the required notice. If the notice has not been served upon the plaintiff, he would not be barred from prosecuting his claim for damages, nor being considered as having waived the same. But if notice has been properly served upon the plaintiff, who fails to file his claim in writing for damages within the two weeks required by

the statute. the complainant would be barred of the right to recover, unless you find from a preponderance of the evidence that he is relieved therefrom by reason of certain information which was procured from the city engineer.

The plaintiff acting in good faith may rely upon the profiles and surveys on file in the office of the city engineer, which were consulted by him, and upon which he relied in making the improvements. But for such as were kept in the office of which he had no notice, and upon which he did not rely, you are not to consider in any other light than as bearing upon the accuracy of the plans, profiles and surveys submitted to you in evidence. But they do not lay the foundation for recovery against the city unless you are satisfied from the evidence that the same were adopted by the city council, and this must appear from the records of the proceedings of the council.

If the plaintiff claims to have been misinformed as to the extent of the cut in front of his premises through the officials of the defendant, and it appears that plaintiff went to the office of the city engineer to examine the plans and profiles of the improvement and learned therefrom of the cut to be made in front of his lot, and being unable to obtain the desired information therefrom; or if the plans and profiles were of such a nature as to require one skilled in such work to understand them, and the plaintiff thereupon requested the engineer to give the desired information, so as to enable him to prepare or determine whether he would prepare or not any claim for damages; and the plaintiff was then informed that the cut in front of his premises would not be more than —— inches at the east line, and not more than about —— feet deep at the west line of his lot, etc., such statement of the city engineer is competent evidence for you to consider in determining whether plaintiff should be deemed to have waived his claim for damages by not filing it within the two weeks provided by statute, and it would be competent if the plaintiff, acting in good faith and knowing nothing to the contrary, relied upon the statement so made by the city engineer, and so relying thereon, did not, and because

thereof, file his claim for damages, such failure to file the claim within two weeks required by statute would not thereby necessarily be deemed to have waived the same, nor by reason thereof necessarily be barred from maintaining this action.

Sickness in the family would not excuse the plaintiff from making the inquiry within the two weeks, nor from filing his claim within that time.¹

¹ This instruction is somewhat changed and modified in language from one given by Judge Voris in *Smith v. City of Akron*, and possibly also in another case with some changes, omitting parts of his charge, so as to make it general in its application.

Sec. 2070. Change of grade—Plans and profiles—Owner may rely upon information and explanation by engineer.

It was the duty of the city to have such a plan and profile on file as would reasonably advise persons of ordinary intelligence of the extent which the proposed improvement would affect the plaintiff's property, but if it so failed to give such information, or gave it in such a manner as required one skilled in such work to understand them, and the plaintiff was not so skilled, then it was competent for the plaintiff to go to the city engineer and seek from him the necessary explanation or information, and to rely upon such explanation and information given in that behalf by the city engineer; and it was competent for the engineer to speak in behalf of the city in giving such information.¹

¹ Voris, J., in *Smith v. City of Akron*.

Sec. 2071. Change of grade—Adopting county road as street.

If you find from a preponderance of the evidence that the city of —— adopted as a street of the city the county road, and established the same as such, without change of grade, for more than thirty years,¹ and the plaintiff erected his dwelling house and other structure, and made his other improvements thereon, and the plaintiff used reasonable care and discretion and judgment in making his improvements, with a view to the

future, proper, and reasonable change of grade, and the city caused a change of grade in such street to be made subsequently, which resulted in damage to such improvements, and the change of grade which caused such injuries could not, by ordinary care and discretion, have been anticipated, then the city would be liable for such injuries, if you find in other respects that the plaintiff is entitled to recover.²

¹ Thirty years is not a necessary period of time, but it should be so long as to create a reasonable presumption of the fixed grade.

² Voris, J., in *Rhodes v. City of Akron*.

Sec. 2071a. Change of grade—Improvement made before grade established is at one's own peril.

If you find from a preponderance of the evidence that, at the time the plaintiff (or his predecessors in title) improved his property, any grade had been established on the street, either by ordinance, or such improvement and appropriation of the street to public use by the authorities of the city as to fairly indicate that the grade was permanently fixed, and no other change would be required by the city, then the plaintiff (or his predecessors in title) improved his property at his peril, and the plaintiff can not recover unless the present grade upon which the improvement has been made is an unreasonable one, or the street improvement was negligently done and by which the injury complained of was caused.

But if the nature and extent of the improvements and use of the street had not been so indicated or defined by the defendant before the plaintiff (or his predecessors in title) made their improvements, then they would be presumed to have made them at their peril, with reference to such future use or change in the street as the city might reasonably adopt and make, he would not be entitled to recover, unless the city adopt an unreasonable grade and made improvements pursuant thereto, or made its said improvements in such a negligent manner as to have caused the injuries complained of.¹

¹ Voris, J., in *Rhodes v. City of Akron*, Summit Co. Com. Pleas.

Sec. 2072. Change of grade—Rule as to unreasonable grade.

If the street improvements were made subordinate to an unreasonable grade—were unreasonable in their nature under all the circumstances—then the city could not be treated as exempt from liability to the plaintiff to the extent that such unreasonable grade and the improvements so made so injured his property. But in that case the damages should be limited to such only as were caused by the unreasonableness of the grade, and the street improvements made pursuant thereto, and none other, and the extent of damages, if any were caused, by what would have been a reasonable grade, he can not recover.

In determining the question whether the same was reasonable or unreasonable, the date of the establishment of the grade is to be considered, and not the time the plaintiff's improvements were made. And the city starts out with the presumption that its officers have acted rightfully, and this presumption must prevail until the contrary appears from a preponderance of the evidence. The law gives the power and imposes upon the city the duty to pave, improve, and keep in reasonable repair the public streets of the city, and in the exercise of this power, and in the performance of these duties, the law presumes that it has acted rightfully until the contrary appears from the evidence. This presumption of law as to the rightfulness exercised by the public authorities of the city is a mere presumption and may be removed by testimony; it is only to be taken as true until evidence is received which overcomes it, and when so overcome this presumption is removed and the evidence should then control.

This discretion reposed in the city council as to the exercise of its authority and duties over the public streets of the city can be exercised by no other persons. It is only for the abuse of that discretion that the courts can interfere. In passing upon the question as to whether or not the defendant made his improvements on a reasonable grade, you must gravely consider whether witnesses who have appeared before you, after

all the evidence which you have had submitted to you, are any better able to decide this matter than the city council.

If you find from a preponderance of the evidence that the city has exceeded its authority, and adopted and acted upon an unreasonable grade, you should say so; but we feel like saying to you that it should be done after the most careful deliberation upon your part, and upon satisfactory evidence.¹

¹ Voris, J., in *Rhodes v. City of Akron*, Summit Co. Com. Pleas.

Sec. 2073. Change of grade—Whether or not premises abut upon improvements as affecting claim for damages.

Whether or not plaintiff's premises did or did not abut on ——— street, is a fact to be determined by you from the evidence. In determining this issue, if you find that the lots or premises have been continually owned, used, and occupied as one parcel of land, and for a dwelling-place and domicile for many years, you may consider that customary use and occupation as determining the character of the land, rather than its subdivision into separate parts, and treat the same as an entire parcel of land.

To entitle the plaintiff to recover it is not necessary that the whole of the front of the premises should abut on ——— street; but, before the plaintiff can recover for injury affecting ingress and egress to and from his premises, it must appear that the substantial part thereof abuts on ——— street. Even though no part thereof abuts on ——— street, yet if you find that the defendant wrongfully, negligently, and by reason of the unreasonable grade, excavated up to and against said premises, so as to substantially and obviously injure plaintiff's said premises and improvements thereon, he would be entitled to recover to the extent of the actual injury to the value of his property caused thereby, not, however, including any damages for deprivation of ingress and egress, as before defined, to and from said ——— street.¹

¹ Voris, J., in *Rhodes v. City of Akron*, Summit Co. Com. Pleas.

Sec. 2074. Reasonableness of grade of street—What should be considered in determining.

In determining the reasonableness or unreasonableness of the grade and improvements of the owner, you should take into account not only the grade of the street in its relation to the locality of the plaintiff's premises, but in its relation to the street as part of the street system, and the relation that said street sustains to this system and the grades thereof. You must consider —— street in a much broader sense than the mere relation it sustains to the plaintiff's premises or their immediate vicinity. It must be taken with reference to the general uses and purposes to which the street is devoted by the city to the public; nor should this be limited to the mere purpose of traveling thereon; it should be considered with reference to the system of drainage, sewerage, and every reasonable public exigency that may grow out of its use and purpose as one of the public streets of the city, so as to harmonize with its street system.

In determining whether the grade is reasonable or not, a mere difference of opinion on your part with the city council, whether the council exercised official discretion and authority reasonably or not, would not justify you in deciding against the action of the council. There must be something more than mere difference of opinion. You must be able to find from the evidence that the council acted unreasonably, that is, arbitrarily, oppressively, taking into account the improvement as a whole, and its various relations as explained to you, or their official action must stand.¹

¹ Voris, J., in *Rhodes v. City of Akron*, Summit Co. Com. Pleas.

Sec. 2075. Change of grade—Recovery of interest on damage.

"If the plaintiff sustained any injury by reason of change of grade, it occurred at the time the change was made, and in determining the measure of damages by the differences between the value of improvements before the change of grade and the

value of the improvements after the change, you are to consider the values at that time. If you find for the plaintiff in that regard, having assessed a reasonable and just compensation therefor, you will then consider the question of interest on the amount of damages found for the plaintiff, and on that question, if you find that the plaintiff is entitled to damages, then he should be allowed interest thereon from the date of his injuries to his improvements up to the first day of this term.”¹

¹ From *Cincinnati v. Whetstone*, 47 O. S. 196.

Sec. 2076. Change of grade—Retaining wall—Whether necessary to protect buildings.

“It is for the jury to say, taking into consideration all the testimony on the subject, whether under the circumstances a retaining wall was reasonably necessary to protect plaintiff’s buildings and improvements, and if a wall was necessary, then whether the wall which was constructed was such a retaining wall as was reasonably necessary. And if you find that the wall was reasonably necessary, and the wall constructed was a reasonable one for the purpose, then the plaintiff should recover the fair and reasonable cost of such wall. And if on this question as to a retaining wall you find for the plaintiff, then he will be entitled to recover interest on the fair and reasonable cost of the retaining wall from the time of its completion up to the first day of the present term.”¹

¹ From *Cincinnati v. Whetstone*, 47 O. S. 196.

Sec. 2077. Streets—Change of grade—Damages—A different form.

Example: Plaintiff owns a lot with a house thereon upon property, the ownership of which has continued for fifteen years. Claim is made that, before the erection of improvements upon the lot, which was vacant at the time of purchase, the city had established the grade for the street in front of the property; that the improvements were made upon the lot in

conformity with the grade thus established, and that thereafter the city changed the grade of the street, thereby injuring the property. The following instructions may fit the case:

“There are several propositions which the plaintiff must prove by a preponderance of the evidence to entitle him to a verdict. You will bear in mind that the city owns all the streets therein, and has a right to exercise the same measure of control over the streets that an individual has over his own property.¹ The streets are for public use, the use of the citizens of the community. The city has the right to change the grade of the streets and to make such improvements as the public authorities in charge of the streets think in their judgment ought to be made. It is only under certain circumstances that a person who owns property abutting on a street can claim damages from the city for injury to that property. Before a recovery can be had you must be satisfied that the city, before these improvements were made upon the lot, established a grade upon the street in front of this property.”²

¹ A city has a *proprietary* interest in the street. *Cincinnati v. Hamilton County*, 1 Disn. 4; *In re Hotel Alley*, 25 W. L. B. 89. It is not private property of the corporation. *State, ex rel., v. Gas Co.*, 18 O. S. 262.

² Pugh, J., in *Braley v. City of Columbus*, Franklin Co. Com. Pleas. City liable where it alters the level of a street after a proprietor has built with an express view to the grade established by the city, 4 O. 500, 4 O. 514, 15 O. 474, 18 O. 229. Lot owners may rely on an established grade, 14 O. S. 523. Grading vacant lot to conform to a grade is an improvement, 5 O. C. C. 225. Improvements made in accordance with an established grade which is afterwards altered entitles owner to compensation, 7 O. S. 459. One who builds in anticipation of an established grade may recover for an unreasonable grade, 34 O. S. 328.

Sec. 2078. Change of grade after improvement—How proved.

Whether or not the municipality has changed a grade after the improvements have been made upon the lot may be proved in several ways. It may be done by showing that the city council passed an ordinance by the terms of which the grade of streets was fixed or established. Where an ordinance is

introduced in evidence to show that a grade has been made, it is necessary that the plaintiff show proof that the ordinance applies to that part of the street upon which the property of the plaintiff is located. It is also necessary that the plaintiff show proof that the authorities of the city having charge of the street at the time, pursuant to the ordinance, went upon the street and graded it as the ordinance requires, or that the public authorities advertised for contracts, and that contracts were awarded to persons who afterwards went upon the street and graded it in conformity with the ordinance.

But the plaintiff is not limited to prove an establishment of a grade by legislative action of the city council, or by the passage of an ordinance or resolution of the council. He may have the right to offer testimony to prove that the public authorities having charge of the streets used the street in such a way as to make it appear that a grade had been permanently established or a level had there been permanently adopted on the street, whether in accord with an ordained established line or not. To show that a grade has been fixed by the city in this manner it is incumbent upon the plaintiff to show that the improvement made upon the street by grading or working it was done under the direction and sanction of the proper public authorities of the city.¹

¹ From *Braley v. City of Columbus*, Franklin Co. Com. Pleas. D. F. Pugh, J.

Sec. 2079. Whether improvement made in conformity to established grade.

Before recovery can be had by the plaintiff he must show by a preponderance of the evidence whether or not the improvement was made upon the lot in conformity to the established grade. It must be shown in substance that the plaintiff was led by the action of the city authorities in thus fixing the grade of the street to take that surface or that level as existing and

as established, and so, without expecting any change to be made thereafter, he erected his improvements accordingly.¹

¹ From *Braley v. City of Columbus*, common pleas. D. F. Pugh, J.

Sec. 2080. Change of grade—Damages recoverable—Injury to building—Shrubbery—Access to premises—Value before and after change.

There may be two classes of damages recovered in such a case, the first being a damage to the property caused by the change of the grade injuring some of the improvements on the lot.

(a) Injury to fences—Shrubbery—Building.

If the change of grade destroy the fences or injure the house in any manner, that would be an injury for which the city would be liable in damages, unless the city repaired the damages afterwards. The questions that you may consider are whether or not the change injured the fence, or property, or any shrubbery, or whether it became necessary to perform work upon the house to restore it to a condition as good as it was before the change of grade.

(b) Injury to access.

The other class of damages consists in the change of grade affecting the use of the property to the extent that the use of the property may have been affected by impairing the access between the street and the lot and the improvements thereon, either over or to the property, the plaintiff, if he has a right to recover, is entitled to damages which he may sustain by reason of such injury to the access to the property. If the street was filled up so that the improvements upon the property were left below the street, that would make it naturally less accessible from the street, and make the street less accessible from the improvements. If that has been proved, then that is the ground upon which you may assess damages.

(c) Value before and after change.

You may inquire also into the value of the property before and after the change of grade, and also as to the cost or expense in making a change in the property so that it may correspond

with the change of grade. This is for the purpose of enabling you to ascertain what the depreciation in the value of the property was, which may be the measure of the damage. If there has been no depreciation in value there can not be any recovery of damages. If there was a depreciation, then the plaintiff is entitled to whatever that depreciation amounts to as expressed in dollars and cents. If the injury that may have been caused to the access to the property has been repaired or remedied by the city, and the value of the property has not thereby been diminished, there can be no recovery at all.

If, after changes which a prudent man would make to restore the premises to as good condition with respect to the new grade as they were in with reference to the old, they are of the same value as before the change of grade, the reasonable cost of such restoration would be what the owner is entitled to recover. If, under like circumstances they are less valuable when restored than before the change of grade, the amount of this diminution in value should be added to the cost of restoration as the amount of the recovery. If, under like circumstances they are more valuable when restored than they were before the change of grade, there should be a recovery for the difference between the cost of restoration and this increase of value, if the increase of value is less than the cost of restoration; but if the increase in the value of the property is more than the cost of restoration, then the plaintiff would not be entitled to recover anything.¹

¹ From *Braley v. City of Columbus*, Franklin Co. Com. Pleas. Pugh, J. Damages can not exceed value of lot, 5 O. C. C. 225. Only injury to premises and not to particular use is recoverable, 12 W. L. B. 247, 130 U. S. 426. See full discussion of allowance of benefits in a note, *ante*, p. 89.

Sec. 2081. Damages—Market value—Opinion evidence.

Inasmuch as you may take into consideration the general value of the property in the market before and after the change of grade, and for the reason that it is the chief measurement of damages, the evidence of course may take a wide range. Wit-

nesses may be put upon the stand by both sides, who will give their opinions as to the value of the property. You are instructed, however, that these opinions are not binding upon you. You are not bound to follow them slavishly. These opinions are competent testimony, and it is your duty to consider them in determining what damages there are, if you find there have been any damages to the plaintiff; but you are not bound to adopt the opinions of the witnesses merely because they have given them. You will take all the evidence into consideration and determine for yourselves, according to your own judgment, what depreciation in value, if any, there was.¹

¹ From *Braley v. City of Columbus*, Franklin Co. Com. Pleas. Pugh, J. The measure of damages is the difference in the market value before and after the change, 119 Mass. 372, 108 Mass. 372, 108 Mass. 60, 52 Ia. 303, 50 Wis. 78.

Sec. 2082. Damages—Enhancement of value.

In estimating the damages which the plaintiff may have sustained, you can not deduct from any injury which the property may have sustained the general benefit that the plaintiff received in common with the general public on account of the improvement in the street. If the improvement of the street, the passage to and from the city for the whole public, not only the plaintiff but of all the general public, was rendered more convenient than it was before, then you can not deduct that benefit from the damages that may have been sustained by the plaintiff. The reason of that is that it is a public benefit and the public must pay for it, and the plaintiff as one of the owners of property abutting on this street must assist in paying for it. The plaintiff pays for that kind of a benefit and, therefore, you have no right to deduct the value of that benefit from any injury which the property may have sustained by the raising of the grade in front thereof.¹

¹ From *Braley v. City of Columbus*, Franklin Co. Com. Pleas. Pugh, J. In a suit to fix damages to result from a street improvement, it is an error to admit evidence of enhancement of value on account of improvement, if no claim is made that such increase results from

a *special* benefit, different from a *general* benefit. *Martin v. Bond Hill*, 7 C. C. 271. See extensive note upon the allowance of benefits, *ante*, p. 89.

Sec. 2083. Change of grade—Damages—Benefits.

Now when the city establishes a grade and abutting owners establish improvements on their property in accordance with such grade, and the city subsequently adopts a different grade, it does so under the responsibility of paying the abutting owners whatever damages accrue to the improvements by reason of such change of grade. Such damages may be either on account of the destruction of the improvements, or by destruction of part and injury to the remaining part. But such damages are allowable only with respect to improvements made in conformity to the established grade, and are limited to the injury to such improvements.

Hence, in considering damages which may have been made after the change in grade in 19— and 19—, if any, so you must exclude from your consideration any effect which the change of grade might have had on the value of the plaintiff's real estate or land. It is simply damages to the improvements to which your inquiry is limited in that regard. As to the amount of such damages, it is simply determined by your ascertaining the decrease in value, how much less valuable were these improvements by reason of raising the grade of the street. In other words, the damages are to be measured by the difference between the value of the buildings and structures immediately before the change of grade in 19— and 19— and the value immediately after the change of grade, without deduction for general benefits that might accrue from change of grade in the vicinity, or from the fact that the property from the change of grade may be improved for public use or passage.¹

Benefits of that sort belong to the public and are not to be considered by you in estimating these damages. To the extent, therefore, that the use of these buildings and improvements are affected by impairing the access to the buildings from the street,

to the extent they have been injured in any other manner by reason of the change of grade, whether by injuring the walls, impairing the usefulness of the buildings, or causing dampness, so far as the change of grade blocks, impairs, or interferes with the access to the property and the damage to the structures, it is for your consideration. So you have also the right to consider whether or not the buildings can be repaired, or whether they may be rebuilt or reconstructed or abandoned. These are all matters to be considered by you in considering how much less valuable the premises are by reason of the changes made. It is not necessary that you should know what the owners may do in regard to repairing, restoring, or abandoning the buildings, but for the purpose of determining the extent of the damages, whether that has been partial or entire. Whether a partial destruction or entire destruction, and for that purpose you may consider the probability of what a prudent man would do under such circumstances; whether to repair, restore, pull down and rebuild, or abandon.

Bearing in mind all the time that the thing you are to determine is, how much less valuable the improvements were after the change of grade than they were before. Testimony has been introduced as to the value of the structures and improvements before the change of grade and after the change of grade, also in regard to the cost of modifying or adapting the buildings to the new grade, according to the various plans, all of which has been admitted not as fixing the amount of damage, but to aid you in arriving at the amount of decrease in value. There is no certain rule that can be laid down as to the extent of which improvements are affected by such a change of grade. It is a question which must be left to your judgment. Taking into consideration the estimates and opinions of witnesses, but being in the end your own judgments. Opinions of witnesses, in the way of estimates of damages, are testimony, but only testimony. And it is your province to judge of the weight of the testimony.²

¹ *Martin v. Bond Hill*, 7 C. C. 271.

² From *Cincinnati v. Whetstone*, 49 O. S. 196. See generally as to damages where Ohio cases are collected.

Sec. 2084. Damages to property owner by construction of street.

As the case has been submitted to you, there is only one thing for you to do, and that is, the value of this property must be assessed at the time it was appropriated to street purposes, and the damage, if any there was, to the remainder by reason of the taking of the part which was taken. The question to be passed upon divides itself into two parts. First, the value of the property which was taken, and, second, the question as to whether the remainder of it was damaged, and, if it was, how much. As to the first question, the plaintiffs are entitled to receive the fair cash value of the property at the time it was taken. It is not what it may have sold for for any particular purpose, or in any particular manner, but what it would have sold for, taking it for all reasonable uses it might have been put to, what was its then fair selling value. And you will consider the nature of the property, its surroundings, and all the legitimate uses to which it could have been put, and all the testimony before you on the subject of its value, and of the value of the property in that vicinity, which has been submitted for the purpose of enabling you to arrive at what this piece of ground was worth. You are not to regard it as if you were buying it; nor are you to regard it as if you were selling it; but generally to look upon it, disinterestedly, and to endeavor to arrive at its fair cash market value at the time when it was taken, as it lay then.

Coming then to the other question as to the remainder of the property. The plaintiffs are entitled to something in addition, if the value of the remainder has been reduced by reason of the appropriation in some way other than the mere taking away; of course the value would be reduced by taking off a portion, but if that is all the damage done, when you have paid them for the portion that has been taken, that would be all they are entitled to. But it sometimes happens that in taking off a piece of property, the remainder is lying in such a situation as to be unavailable, or, at least, of very little use or value. So, while

there may be a considerable piece of property left in some cases, yet it is lying in such shape and condition that it is of very little use, and that is what we mean when we say they are entitled to recover any damage of that sort which may have occurred to this piece of property which is left. You will consider its situation immediately after the appropriation was made by the city. To determine whether or not it was damaged by the appropriation of the piece that was taken for some purpose you may take into consideration the fact that the piece that was taken was taken for street purposes; and in determining this question of the damage to the remainder, you may take into consideration whether there were any incidental benefits to the remainder which would offset any damage that there might be in some aspects; for instance, it might be damaged in one aspect of it, and it might be benefited in another, and in considering the question of damage to the remainder, you may take that matter of benefit into consideration, so as to determine whether upon the whole the piece that remains in possession of the L. estate was or was not damaged. If it was not, upon the whole, then they are not entitled to anything. If it was, then they are entitled to the amount of that damage, whatever you may find it to be; but in no event can you set off any benefits that may have accrued to the property, or any of it, by reason of the construction of a new street there, as against the compensation that the plaintiffs are entitled to for the amount actually taken; that they are to have compensation for under the constitution and laws of this state, without any deduction for any benefit that the street may have been to the remainder.¹

¹ From Joseph Longworth, *et al.*, v. City of Cincinnati, supreme court, No. 1453. H. D. Peck, J.

Sec. 2085. Excavation in street—Negligence in making—Signals or lights—Right of travel subject to temporary obstructions or excavations.

Negligence on the part of the defendant is the failure of its servants or agents to observe such ordinary care and prudence

as was reasonably necessary to be observed by them as ordinary and prudent persons engaged in the work of making the excavation and in maintaining such signals by lights or other guards as were reasonably necessary to warn persons lawfully, prudently and carefully passing along the street of the danger therefrom.

In determining the question of the alleged negligence of the defendant, the jury will consider the nature and character of the excavation and its location in the street.

Negligence of the plaintiff under the conditions and circumstances shown by the evidence, is the failure on her part to observe such care and prudence as was reasonably required to be exercised by her, or such care and prudence as would be observed by an ordinarily prudent and careful person, passing along the street and around the excavation in order to avoid injury to herself.

In determining whether she exercised ordinary care under the facts and circumstances shown by the evidence, the jury will consider all the evidence showing the nature of the excavation, the signals, lights, or other means of warning, the means and opportunity she had of learning and knowing the danger from such excavation.

Negligence of either plaintiff or defendant is the failure of either to observe such care as ordinary prudence would have observed under the conditions and circumstances shown by the evidence.

Ordinary care is that degree of care and prudence which persons of ordinary care and prudence are accustomed to observe under similar circumstances.

Ordinary care as applied to the conduct of the defendant is such care as is ordinarily exercised by ordinarily prudent persons engaged in making similar excavations in the streets of a city, and in guarding the same, and in adopting such means of warning persons passing along the street of the dangers therefrom.

Ordinary care as applied to plaintiff is such care as persons of ordinary care and prudence ordinarily observe in protecting themselves from the dangers arising from such excavations.

The city is not an insurer of the safety of its streets, not even against injury from dangerous excavations.

The right of transit in the use of the streets is subject to such incidental, temporary obstructions or excavations as are reasonably necessary in the construction of trenches or excavations incident to public or private improvements, which are qualifications of the right of transit in the streets when they are made and guarded by the exercise of ordinary care and prudence.

It is the duty of a city, and it was the duty of defendant in making the excavation in question to observe such care and prudence as the circumstances reasonably required, considering its nature and the care required of ordinarily prudent persons in making such an excavation and in guarding and protecting the same from danger or injury to persons lawfully passing along the street and who are in the exercise of ordinary care and prudence under the circumstances.

Duty to guard excavation.

It was the duty of defendant, through its servants and agents to observe ordinary prudence and care to guard such excavation from danger and injury to travelers in the street in the exercise of ordinary care and prudence, by placing such guard rails, lights or other reasonable warnings in the night as was reasonably necessary to warn foot travelers along the street of the danger therefrom, such as was reasonably calculated to protect persons so passing along the street from injury.

If the jury, observing and applying the rules prescribed in these instructions, finds that the defendant failed to perform its duty, and failed to guard and protect the plaintiff from injury, providing she herself observed ordinary care, and that such failure or negligence of defendant was the proximate cause of the injury complained of by plaintiff, then your verdict should be for the plaintiff.

Proximate cause of the injury is the efficient cause thereof; it is the negligent act of defendant which directly caused the injury.

If the jury find that both plaintiff and defendant were guilty of negligence in the particulars stated in these instructions, you will determine whether the cause of the injury to plaintiff was the negligence of the defendant, or whether it was due to the want of ordinary care and prudence of plaintiff herself.

If you find that the injury was the direct cause of plaintiff's own negligence your verdict should be for the defendant.

If the direct cause of the injury was the negligence of the defendant, then your verdict should be for plaintiff.

And if so, you should award her such damages as in your judgment will compensate her for the injury by her sustained considering the nature and extent thereof. In awarding her damages you may consider pain and suffering, if any, she suffered from such injury, and you will include the cost of medical attention as shown by the evidence.¹

¹ Franklin Co. Com. Pleas, Kinkad, J.

Sec. 2086. Obstruction of sidewalk when building.

1. *City may permit reasonable part to be used.*
2. *Right and duty of traveler in use of sidewalk.*
3. *City not liable unless it had notice and knowledge.*

1. *City may permit reasonable part to be used.* The city had the right to permit a reasonable part of the sidewalk to be used for the purpose of depositing thereon building materials used in the process of constructing the building.

2. *Right and duty of traveler in use of sidewalk.* The plaintiff had the right to use the sidewalk unobstructed and free from danger, but subject, however, to such incidental temporary or partial obstructions as are necessarily occasioned in the building of houses fronting upon the street. But in using the sidewalk she must exercise reasonable and ordinary care to avoid obstructions if any be found thereon. In the night time she had the right to suppose in the absence of signals, if that be

the fact, that the sidewalk was not dangerously obstructed, or dangerous to pass over, but in passing over it she must exercise ordinary care and prudence to avoid any dangerous obstructions. It does not mean, however, that she may shut her eyes and take her chances on any possible condition of things. She is required to use that care and discretion that prudent persons are accustomed to use in passing along sidewalks under the same or similar circumstances.

3. *City not liable unless it had notice and knowledge.* Whilst it was the general duty of the city to keep the sidewalks in safe condition for the use of persons passing over the same, and liable for injuries caused by its negligence, or omission to keep them reasonably safe and open, yet in such a case the basis of the action being negligence it is not liable for any injury resulting from such negligence unless it had notice or knowledge of the obstruction that caused the injury before it was sustained. Or in the absence of express or direct notice such notice or knowledge may be inferred from facts and circumstances, if any there be, showing the dangerous condition of the sidewalk had existed for such length of time and under such circumstances and surroundings without proper lights or guards to denote dangerous obstructions as that the officers representing the city or those in the employment of the city for the purpose of keeping the streets open and free from danger in the exercise of ordinary care and diligence ought to have known of such dangerous condition and want of proper guards at the right time and had time to place same in proper condition. This is what is known as constructive notice. It is constructive notice as distinguished from actual notice.

You are to be the judges of the time necessary to have constituted constructive notice, if that appears from the evidence in the case. I can not instruct you as to the exact length of time necessary for such constructive notice. It should be for such a length of time and under such circumstances and surroundings as in the exercise of ordinary care it ought to have

been known, or it must be held to be known, because it was bound to have been known by reason of its long existence.

You will first consider whether the sidewalk was so obstructed and in such a condition by reason of the materials alleged and without proper signals or guards as to be dangerous; then whether the city knew it. In this action if it appears from the evidence that the city had no notice, express or implied of such obstruction to the sidewalk, and the city did not cause said obstructions, then the defendant is not liable, and in such event your verdict should be for the defendant.¹

¹ Penrod v. City of Columbus, Court of Com. Pleas, Franklin Co., Ohio.
Rathmell, J.

CHAPTER CXXI.

NEGLIGENCE—GENERAL RULES.

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Sec. 2087. General form of opening statement.

After statement of pleadings and facts proceed:

By this statement of the claims of the parties you have been given in substance the matters on which the parties are at issue by their pleadings. These pleadings will be before you and can be examined by you; but, aside from the admissions therein, they are not evidence in the case, and must not be considered or regarded by you. These issues present for your consideration and determination three principal propositions which are as follows: 1. Was the defendant negligent in one or all of the particulars complained of? 2. If so negligent, was this negligence the proximate cause of the injury to plaintiff of which he complains? 3. Did the negligence or want of care on the part of the plaintiff contribute to cause or produce the injury which he sustained?

Taking up these questions in the order suggested, you will proceed to inquire and determine whether or not the defendant was negligent in any or all of the particulars complained of, and if you find that it was not so negligent, then you need not inquire further, but should return your verdict for the defendant; but if you find it was so negligent, then you will proceed further and inquire and determine whether or not this negligence so found by you was the proximate cause of the injury to the plaintiff of which he complains, and if you find

it was not such cause, you need not inquire further, but return your verdict for the defendant; but if you find it was such cause, then you will proceed to inquire and determine whether or not the plaintiff himself was negligent, and if you find he was negligent and that his negligence contributed to the cause or produced his injuries, the defendant would be entitled to your verdict; but if you find there was no contributory negligence on the part of the plaintiff, and have also found the other matters to which your attention has just been called in his favor, then the plaintiff would be entitled to your verdict.

Sec. 2088. Explanatory instruction to jury concerning its duty.

1. *As to duty of parties under the circumstances.*
2. *Concerning claims of both parties.*
3. *Jury to find ultimate fact.*

To enable you to decide the fact, the court instructs the jury as to the duty of the defendant as well as that of the plaintiff and his servant or agent under the conditions and circumstances disclosed by the evidence and according to the undisputed facts before stated.

Gentlemen, the court being aware of the claims asserted by parties, charges the law applicable to both. One asserts one claim in evidence, and another another; the court knows that the jury may form your own conclusions on the evidence and on the facts which you will find from the evidence. The function of the court is merely to charge the jury as to the law upon the conflicting claims made by the plaintiff and the defendant. The court states the rule of law that will govern the claim of plaintiff, as well as that relating to the claim of defendant so that the jury, by the application of the rule of conduct and of the law, may apply it according as it may find the facts to be.

There is in law a term that is designated an ultimate fact. That means a fact which will be drawn from the evidence in the case by the jury. That ultimate fact is evidenced by the verdict of the jury; that ultimate fact is the fact to which the

law attaches legal consequences. The court gives you the law, and you attach the legal consequences to the act by your verdict, because you must follow the rule of law given you by the court; so that by your verdict, in the end, you not only find the fact, but you attach the legal consequences by the application of the rule of law given you by the court in your verdict.

Sec. 2089. Another form of opening.

The plaintiff holds the affirmative, upon him rests the burden of establishing the right to recover.¹

There is no presumption that the railroad company was negligent, or that the negligence of the railroad company occasioned the injury complained of, from the mere fact that the plaintiff received his injury while he was in the service of the company.² To entitle the plaintiff to recover it is incumbent upon him to show by a preponderance of evidence that the company was negligent in the respects complained of in the petition—or some of them—and that the injury which the plaintiff received resulted directly from such negligence. And there is this further general rule: Notwithstanding any negligence of the defendant, the plaintiff can not recover if he was himself guilty of contributory negligence, as it is called, that is, if, by his own failure or omission to exercise ordinary and reasonable care, he contributed to his own injury.

The burden of proving contributory negligence on the part of the plaintiff is upon the defendant,³ with this qualification: that if the testimony introduced by the plaintiff as to the circumstances under which this injury was received fairly raises a presumption in your minds that he was guilty of contributory negligence, then the burden is upon him to remove that presumption.⁴

The general questions, then, which are involved in this case are: whether there was negligence on the part of the defendant, and whether there was contributory negligence on the part of the plaintiff. The burden of proving contributory negligence

on the part of the plaintiff is upon the defendant, with the qualification already stated.

¹ Cooley, 809.

² Cf. Cooley on Torts, 794. Presumptions under certain circumstances. *Id.* 796. There is a presumption of negligence from a collision. *R. R. Co. v. Mowery*, 36 O. S. 418.

³ There is a presumption that plaintiff is free from negligence which casts burden of proof on defendant, 15 Wall. 401, 50 Cal. 7, 30 Wis. 892, 51 Mo. 190, 66 Pa. St. 393.

⁴ *Railroad Co. v. Whitacre*, 35 O. S. 627. But see Cooley on Torts, 809-10, cases in note 1, p. 110.

Sec. 2090. Negligence—Ordinary care—Defined.

Negligence in a legal sense consists of some act or omission of duty that, in the natural and ordinary course of events, might cause all the injury complained of. It is defined as being ordinary want of care, and may consist in doing something that ought not to be done, or in not doing something which ought to be done. By ordinary care we mean that degree of care which persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others, and the objects to be accomplished. It is such care as prudent persons are accustomed to exercise under the peculiar circumstances of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous, because prudent and careful persons in such cases are accustomed to exercise more care than in cases less perilous. It is still nothing more than ordinary care under the circumstances of the particular case. But it should be that degree of care and prudence that the circumstances reasonably require; that is, it should be commensurate with the hazards ordinarily encountered.

The circumstances determine whether the proper amount of care has been exercised or not. The want of proper care is

the want of that care which a reasonable man, guided by these considerations which regulate the conduct of human affairs, would have exercised under the circumstances of the particular case, the failure to observe the protection of the interests of another person, that degree of care, precaution, and vigilance which the circumstances justly demand.¹

¹ Voris, J., in *Quinn v. Ewart*, Summit Co. Com. Pleas.

Negligence defined. *Kinthead's Code Plg.*, sec. 914; *Harriman v. Railway Co.*, 45 O. S. 20; *Cooley on Torts*, 791 (659); *Moulder v. R. R. Co.*, 1 O. N. P. 361.

Distinction between gross and ordinary negligence, 37 O. S. 301, 313, 12 O. S. 475, 496, 28 O. S. 388, 402; *Cooley on Torts*, 753 (631); *Jones on Bailments*, 4-10.

Ordinary care is usually defined in instructions according to definition in *Terry case*, 8 O. S. 582.

Negligence is the absence of care according to the facts and circumstances of each case, 29 Md. 420, 78 Pa. St. 219, 54 Pa. St. 345. *Cooley's* definition: "Negligence is the failure to observe, for the protection of the interest of another, that degree of care, precaution and vigilance which the circumstances justly demand" (*Cooley*, 630), is generally accepted. *Jaggard on Torts*, 810, where various definitions are collected.

Negligence should be measured by the character and the risk of the business. *Railway Co. v. Gormly*, 27 S. W. 1051.

Sec. 2091. Negligence—Another definition.

Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under such circumstances would not have done. The duty is dictated and measured by the exigencies of the occasion.¹

¹ *B. & P. R. Co. v. Jones*, 95 U. S. 439.

Sec. 2092. Negligence—A concise definition.

Negligence in law is meant the unintentional failure to perform a duty owing to another whereby damage naturally and proximately results to another. Damage proximately resulting means that the act claimed to be negligent, the act of omission or commission, the act whereby the defendant did not exercise

reasonable or ordinary care, must proximately result in an injury to another. By proximately is literally meant nearest, directly. It means that the act in question operated directly to cause the injury and without the intervention of any unforeseen cause without which the accident would not have occurred.¹

¹ Dillon, J., Franklin county.

Sec. 2093. Negligence exists only when there is a duty—Essential elements to constitute.

Actionable negligence exists only when one negligently injures another to whom he owes the duty of exercising care.¹ It is the failure to discharge a legal duty to the person injured. If there is no duty, there is no negligence.² There are necessarily three elements essential to its existence: 1. The existence of a duty on the part of the defendant to protect the plaintiff from injury of which he complains. 2. A failure by the defendant to perform that duty; and 3. An injury to the plaintiff from such failure of the defendant. When these elements are brought together, they unitedly constitute actionable negligence. The absence of any one of these elements renders the evidence insufficient.³ In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards plaintiff, which the defendant has left undischarged or unfulfilled. This is the basis on which the action rests. There can be no fault or negligence or breach of duty where there is no act or service or contract which a party is bound to perform or fulfill.⁴

¹ B. & O. R. Co. v. Cox, 66 O. S. 276.

² Akers v. R. R. Co., 58 Minn. 540.

³ Faris v. Hoberg, 134 Ind. 269, 39 Am. St. 261.

⁴ Sweeney v. R. R. Co., 10 Allen, 368, 87 Am. Dec. 644.

Sec. 2094. Imports want of attention.

The term negligence imports a want of such attention to the natural and probable consequences of the act or omission com-

plained of as a prudent man ordinarily bestows under the same or similar circumstances.¹

¹ *Zilke v. Johnson*, 22 N. Dak. 75, 132 N. W. 640, Am. Ann. Cas. 1913, E. 1005; *Boelter v. Lumber Co.*, 103 Wis. 324, 79 N. W. 243.

Sec. 2095. Negligence, active or passive.

Negligence may be active or passive in character; it may consist in heedlessly doing an improper thing or in heedlessly refraining from doing the proper thing. Whether the circumstances call for activity or passivity, one who does not do what he should is equally chargeable with negligence with him who does what he should not.¹

¹ *Basler v. Gas & Elec. Co.*, 158 Cal. 514, 111 Pac. 530, Ann. Cas. 1912, A. 642.

Sec. 2096. Ordinary care—Negligence—Relationship—Duty.

The term "ordinary care" is of a flexible nature, and adapts itself to the particular circumstances under which it is to be applied. It depends upon the relation existing between the parties in interest, as well as the business in which they may be engaged, and varies with the peculiar phase of every situation.¹ When complaint is made of failure to use ordinary care, a duty toward the complaining party must be shown to exist. If there is no relationship, there is no duty.² Unless and until one is brought into relation with other men, or their property or rights, he has no obligation to act with reference to them; and this is so, whether the obligation be called legal, moral or reasonable, as most of the rights of persons and property in the social state are not absolute, but relative.³

¹ *Palace Hotel Co. v. Medart*, 87 O. S. 130.

² *Garland v. Railroad*, 76 N. H. 556, 86 Atl. 141, Am. Ann. Cas. 1913, E. 924.

³ *Id.*

Sec. 2097. No element of purpose or moral turpitude.

The ordinary act of negligence has in it no element of moral turpitude. There need be no purpose to commit a wrong as to

any one, nor a conscious remissness in legal duty. When such a purpose or consciousness exists, there is an added reason for holding the wrongdoer responsible for all consequences of his act. It is this idea which is at the foundation of the law imposes liability when the fault is wanton or willful, or what is sometimes called gross negligence.¹

¹ *Garland v. Railroad*, 76 N. H. 556, 86 Atl. 141, Am. Ann. Cas. 1913, E. 924.

Sec. 2098. Ordinary care under circumstances of peculiar peril—Intent not an element of negligence.

It is defined as being the want of ordinary care, and may consist in doing something which ought not to be done, or in not doing something which ought to be done. Ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances, in order to conduct the enterprise in which they are engaged to a safe and successful termination, having due regard for the rights of others and the objects to be accomplished. The ordinary care required by the rule has not only an absolute but also a relative signification. It is such care as prudent persons are accustomed to exercise under the peculiar circumstances of each case. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous, because prudent and careful persons, having in view the objects to be attained, and the just rights of others in such cases, are accustomed to exercise more care than in cases less perilous. The amount of care is, indeed, increased, but the standard is the same; it is still nothing more than ordinary care under the circumstances of the particular case.

The circumstances, then, are to be regarded in determining whether ordinary care was exercised. The want of proper care is the want of that care which a reasonable man, guided by those considerations which should regulate the conduct of human

affairs, would have exercised under the circumstances of the particular case.

Intent is not an element of legal negligence. Therefore, the plaintiff need not show that the injury was intentional; but the negligence complained of, to enable the plaintiff to recover, must be the proximate cause of the injury.

Sec. 2099. When negligence is wanton.

Negligence which is called wanton is where the person causing the injury at the time sees and knows that the person injured is in a position of peril, and, notwithstanding such knowledge, commits the act causing the injury, though it was in his power to refrain from doing such act. If the jury find from the evidence that the plaintiff was injured by the pike in the manner as claimed, and that one of defendant's servants, knowing that she was there in a position of peril, moved the pike and injured her, such would be a wanton injury, for which the defendant would be liable.¹

¹ Approved in *Souther v. Tel. & Ex. Co.*, 118 Minn. 102, 136 N. W. 571, Am. Ann. Cas. 1913, E. 472.

Sec. 2100. General duty to everybody becomes a particular duty to single person, when—Duty of owner of premises to keep them reasonably safe.

The duty which forms the basis of a negligent act may be general and owing to everybody, or it may be particular and owing to a single person only by reason of his peculiar position. But a duty owing to everybody can never become the foundation of an action until some individual is placed in position which gives him occasion to insist upon its performance. It then becomes a duty to him personally.

It is difficult at times to distinguish between actions of nuisance and actions bottomed on negligence; but in either case there must be a breach of some duty on the part of the defendant before an action will lie against him. Thus one is under no duty to keep his premises in a safe condition for the visits of

trespassers. But, if he expressly or by implication invites others to come upon his premises, it is his duty to be reasonably sure that he is not inviting them into a place of danger, and to this end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit.¹

¹ *Upp v. Darner*, 150 Iowa, 403, 130 N. W. 409, Ann. Cas. 1912, D. 574; *Dalin v. Worcester Con. St. R. Co.*, 188 Mass. 344, 74 N. E. 597.

Sec. 2101. Cause not negligent act alone, but injury proximately resulting from breach of duty.

The cause of action for negligence is not the negligent act; for a negligent act is not in itself actionable, but only becomes the basis of an action when it results in injury to another. In order to support an action there must be met only the negligent act, but there must result therefrom a consequential injury proximately caused by the violation of a duty owing to the one injured which is the gravamen or gist of the charge of neglect.¹

¹ The above, in the main, is taken from *Ochs v. Public Serv. Co.*, 81 N. J. L. 661, 80 Atl. 495, Ann. Cas. 1912, D. 255. The case holds that the negligent act does not constitute the cause, but the consequence following it. It ignores the question of duty, the violation of which, according to weight of opinion, constitutes the cause. *Bilikan v. Columbus Railway & Light Co.*, 10 N. P. (N.S.) 561, where the matter is extensively discussed and the authorities cited.

Sec. 2102. Burden of proving negligence.

The rule is that one who seeks to recover of another on the ground of negligence on the part of the defendant, assumes the burden of maintaining not only the negligence complained of, but that such negligence has occasioned him loss. And this he must establish by the greater weight or preponderance of the evidence.¹

¹ *Hilsinger v. Trickett*, 86 O. S. 286, Ann. Cas. 1913, D. 421.

Sec. 2103. Ordinary care.

Ordinary care means that degree of care which persons of ordinary care and prudence are accustomed to use and employ,

under the same or similar circumstances, in order to conduct the enterprise engaged in to a safe and successful termination, having due regard to the rights of others and the object to be accomplished. *Ordinary care*, therefore, requires in different circumstances different degrees of watchfulness, so that what would be reasonable or ordinary care under one state of circumstances would not be such under another.

By the term "ordinary care," as here used, is meant such care as ordinarily prudent persons ordinarily exercise, or are accustomed to exercise, under the same or similar circumstances, in conducting and carrying on the same or similar business, and this applies to the defendant so far as the negligence complained of is concerned, as well as to the plaintiff in regard to contributory negligence on his part.¹

¹ Terry case, 8 O. S. 582. The obligation to exercise care "must be determined in all cases by reference to the situation and knowledge of the parties and all the attendant circumstances. What would be extreme care under one condition of knowledge and one state of circumstances would be gross negligence with different knowledge and in changed circumstances," 15 Wall. 524.

Sec. 2104. Ordinary care under circumstances of peculiar peril.

By ordinary care is meant that degree of care which a person of ordinary care and prudence is accustomed to use and employ under the same or similar circumstances. If called into exercise under circumstances of peculiar peril, a greater amount of care is required than when the circumstances are less perilous, because prudent and careful persons, having in view the object to be attained and a just regard for the rights of others, are, in such cases, accustomed to exercise more care than cases less perilous. The amount of care is indeed increased, but the standard is still the same. It is still nothing more than ordinary care under the circumstances of the particular case. The jury

ought, therefore, to take into consideration the circumstances in determining whether or not ordinary care was used.¹

¹ Ordinary care varies with the danger and circumstances, 24 O. S. 631, 639, 24 O. S. 670, 676, 50 O. S. 135, 144. It varies in proportion to the peril, 8 O. S. 570, 581. Even in dangerous business ordinary care only is to be used; the degree of care is always ordinary under the circumstances of each particular case. The degree of care may be increased in different cases, owing to the character of surrounding circumstances. *Weiser v. St. R. Co.*, 10 O. C. C. 14.

It is denominated "ordinary," in the sense that it is such as persons of ordinary care and caution usually observe under like circumstances; and it is sometimes denominated the "highest" degree of care and caution, in the sense that persons of ordinary care and caution usually observe their highest degree of care and caution under such circumstances; that is, where human life is in peril. It is "ordinary" care and caution, with reference to the *class of persons* who exercise it, but it is the "highest" degree of care and caution with reference to the *circumstances* under which it is exercised. *Railway Co. v. Snyder*, 24 O. S. 676.

Sec. 2105. No presumption of negligence against either party.

There is no presumption against either party in this suit, excepting such as arises from the facts proved. The presumption of law is that neither party was guilty of the negligence or wrongful conduct alleged, and such presumption must prevail until overcome by the evidence submitted to you. The wrongful acts complained of in order to enable the plaintiff to recover must be the proximate cause of the injury.¹

¹ *Voris, J.*, in *Quinn v. Ewart*, *Summit Co. Com. Pleas.* This is applicable of course to cases where there is no such presumption.

Sec. 2106. Proximate cause defined and explained.

By proximate cause is meant a cause from which a man of ordinary experience and sagacity could foresee what result would likely follow; that the injury was of such a character as might reasonably have been foreseen or expected as a natural and ordinary result of the acts or omission complained of. The injury must have been the direct and not the remote result thereof. In this sense you will inquire into the evidence to

determine whether the defendants were guilty as charged; whether the decedent was guilty of contributory negligence as charged. In the light of the evidence, how do you find the facts alleged in the plaintiff's petition to be? How do you find the facts charged in the answer to be? The evidence and our instruction to you should be your sole guide in determining the true answers to these questions. You have no right to indulge in speculation or conjectures not supported by the evidence. The plaintiff can only recover upon the particular acts complained of in the petition, but it is sufficient if you find any such acts or omissions on the part of the defendants that proximately caused the injury complained of, if in other respects your finding answers the conditions of our instructions to you. Injury alone will not support an action, there must be a concurrence of injury and wrong.¹

¹ Voris, J., in *Quinn v. Ewart*, Summit Co. Com. Pleas. *Sherman and Red. on Neg.*, sec. 26.

Sec. 2107. Proximate cause—Another definition.

By this term "proximate cause" is meant the cause which directly produced the injury. This term is used in contradistinction to the term "remote cause." A proximate cause does not necessarily mean the cause nearest in point of time or in point of distance, but it does mean that cause without the existence of which the injury would not have been sustained. Sometimes an intervening cause may occur between a proximate cause and the result which follows from this proximate cause. If such intervening cause is an independent one, and one which would not necessarily follow or result from the proximate cause itself, then this independent, intervening cause would be and constitute a proximate cause in a series of causes which combine to produce the injury, and if this intervening cause was the necessary or natural result of the original cause, even though it may have been nearer the result in point of time than the orig-

inal cause, it would not constitute the proximate cause, but would be regarded in law as the remote cause of the injury.

Definitions.—"The proximate cause of an injury is that which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. . . . The remote cause is that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof." *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253. See, for full treatment and copious notes, Cooley on Torts, 73-86.

Where the carelessness of plaintiff as well as that of defendant contributed to the injury, the jury should be instructed unambiguously that the plaintiff can not recover if the jury so find the facts. *Railway Co. v. Krichbaum*, 24 O. S. 119. See Cooley on Torts, 816 (679).

In cases of mutual negligence, the negligence of each is the proximate cause, and neither can recover, 6 O. S. 105, 109, 3 O. S. 172, 188, 24 O. S. 119. Plaintiff's negligence to bar recovery must be a proximate cause, 4 O. S. 474, 3 O. S. 172.

Sec. 2108. Contributory negligence.

Contributory negligence which precludes a recovery for an injury must be such as co-operates in causing it, and without which it would not have happened.¹

¹ *Gregoric v. Mining & P. Co.*, 52 Colo. 495, 122 Pac. 785, Am. Ann. Cas. 1913, E. 1030.

Sec. 2109. No recovery when there is contributory negligence.

Nor can the plaintiff recover compensation for any damages which he might have avoided by the use of ordinary care and prudence under the circumstances; so, if the plaintiff (or decedent) did not take reasonable care under the circumstances, or if he voluntarily exposed himself to hazards he ought not to have encountered under the circumstances known to him, or that reasonably ought to have been known to him, and he thereby proximately caused the said injuries, the plaintiff can not recover. All that the law requires of the injured party in this respect is that he should act with reasonable care and prudence under the circumstances known to him, or that reasonably ought to have been known to him. That is, he should act reasonably,

considering the means of knowledge he had and the circumstances surrounding him, taking him just as you find him to have been, considering his age, inexperience, intelligence, and judgment as you find them to be from the evidence.¹

¹ Voris, J., in *Quinn v. Ewart*, Summit Co. Com. Pleas.

Contributory negligence only ceases to be a defense if defendant could have avoided the injury *by ordinary care*, 8 W. L. B. 257. The plaintiff's right of recovery is not precluded in all cases where he omits to employ his senses to discover and avoid injury, even though the omission be regarded as negligence. It does so only when the omission *contributes* to the injury. *R. R. Co. v. Whitacre*, 35 O. S. 631; *R. R. Co. v. Crawford*, 24 O. S. 628.

Sec. 2110. Contributory negligence—Must be proximate cause of injury.

If you find from all the evidence in the case that plaintiff was not in the exercise of ordinary care at the time of the injury, and that this absence of due care, together with the negligence of the company, combined to cause the injury and death to him, then he would be guilty of contributory negligence within the meaning of the law, and his administrator could not recover [or the plaintiff may not recover].

The negligence of which I have spoken, whether on the part of B. or the defendant, must, in the language of the law, be a proximate cause of the injury. An act or omission is the proximate cause of an event when, in the natural order of things and under the circumstances, it would necessarily produce that event; that is to say, when it is the first and direct power producing the result. If the negligence and resulting damages are not known by common experience, or are not found by you to be usually and naturally in sequence, and the damage does not, according to the ordinary course of events, follow from the negligence, then the negligence and the damage are not sufficiently conjoined—not sufficiently linked together—as cause and effect to sustain an action if the negligence be that of the defendant, or to bar an action as contributory negligence if the negligence in such case be that of plaintiff.

Hence, if you find from the evidence that the defendant company was negligent, but that said negligence was not linked to said injury as cause to effect, then such negligence was not a proximate cause as before defined, and will not sustain this action. If, on the other hand, you find that the plaintiff was guilty of negligence, and you further find that such negligence did not contribute as a proximate cause to the injury, then the plaintiff will not, for that reason, be barred of a recovery in this action.¹

¹ W. T. Mooney, J., in *Chicago & E. R. R. Co. v. Purviance*.

Sec. 2111. When plaintiff must show himself without fault or to rebut inference of negligence.

It is not necessary in the first instance that plaintiff should show he was free from blame and not in fault, unless his own evidence suggests that he was negligent and to blame for the injury. If contributory negligence is suggested by plaintiff's own evidence, then the burden is on him to remove and dispel the suggestion, and show himself blameless to the jury. If not so suggested by plaintiff's evidence, then such contributory negligence as will defeat a recovery, to be available, must be shown by defendant. In such case, the burden is on the defendant, and it must make it appear to the satisfaction of the jury by a preponderance of evidence.¹

¹ When the case is such as necessarily devolves carefulness on the part of plaintiff, and the testimony to support it fairly puts in question the due exercise of care on his part, the jury, in determining the question of contributory negligence, should consider all the evidence. *Robinson v. Gary*, 28 O. S. 241. If plaintiff's testimony raises a presumption of contributory negligence, the burden is upon him to remove that presumption. *R. R. Co. v. Whitacre*, 35 O. S. 627, 630; *Hays v. Gallagher*, 72 Pa. St. 140; *Wharton on Neg.*, secs. 425, 428, 28 O. S. 241.

Sec. 2112. Burden of proving contributory negligence.

The burden of proof as to contributory negligence is upon the defendant, unless the evidence introduced on the part of the

plaintiff tends to show that the plaintiff was guilty of negligence, in which case it would be your duty to find from a preponderance of the evidence of the whole truth that he was not guilty of negligence that contributed to his injury before he would be entitled to recover.¹

¹ The authorities upon the burden of proof vary in different states. Sherm. & Red., secs. 106-7. See *ante*, No. 401, note. See full discussion also in Booth's Street Railways, sec. 381; B. & O. R. R. Co. v. Whitacre, 35 O. S. 627.

Sec. 2113. Contributory negligence as applicable to children.

“In the application of the doctrine of contributory negligence to children for injuries occasioned by the wrongful conduct or negligence of others, their conduct should not be judged by the same rule which governs that of adults; and, while it is their duty to exercise ordinary care to avoid the injuries complained of, ordinary care for them is that degree of care which children of the same age of ordinary care and prudence are accustomed to exercise under similar circumstances.

“Persons who employ children to work with or about dangerous machinery, or in dangerous places, should anticipate that they will exercise only such judgment, discretion, and care as is usual among children of the same age under similar circumstances, and are bound to use due care, having regard to their age and inexperience, to protect them from the dangers incident to the circumstances in which they are placed, and as a reasonable precaution in the exercise of such care as ought reasonably to be expected of them, guarding against and avoiding injuries arising therefrom. But since the enactment of April 18, 1890,¹ they may not willfully employ or permit children under the age of 16 years to be placed in a position, or to be engaged in such employment, that their life or limb is in danger.

“Such employee who has not been so instructed, and who, while in the discharge of his duty as he understands it, suffers an injury in consequence of the employer's negligence, may maintain an action against the employer therefor, notwithstanding

ing that, by reason of his youth and inexperience and the failure of the employer to properly instruct him, he did some act, in the performance of his duty according to the judgment and knowledge he possessed, which contributed to the injury, but which he did not know and was not advised would be likely to injure him."²

But it is for you to determine from a preponderance of the evidence whether the decedent was or was not a child under the age of 16 years; and if you find him to have been under that age, whether or not the defendants willfully permitted his life and limb to be endangered while so employed by them, or willfully permitted him to be placed in such position, or to engage in such employment at the time of the injury, that his life or limb was endangered; whether he was properly instructed; and whether or not such willful and negligent conduct, if any such existed, caused the injury complained of. These delinquencies must have existed at the time of the injury and be the cause thereof to enable the plaintiff to recover, if they existed.³

¹ 87 O. L. 161.

² *Rolling Mill v. Corrigan*, 46 O. S. 283; *Beach Contrib. Neg.*, sec. 136.

³ *Voris, J., in Quinn v. Ewart*, *Summit Co. Com. Pleas.* See *Sherman & Redf. on Neg.*, secs. 70, 73.

Sec. 2114. Consent of children—Effect.

While, in a general way, it may be said that to the consenting there can be no damage, yet the consent, to avail as a defense, must be the consent of a person capable of giving consent. They must have intelligence, judgment and free will; not idiots, imbeciles, insane or mere children. The law holds that infants in general can not give consent, but this holding can not apply to all infants. It is, after all, in actions like this, a question of capacity to be determined by the jury under the circumstances of the case, considering them as children. In any event the consent must be founded in an intelligent judgment to be available. This legal disability arises out of the tender regard

of the law to the want of understanding and inexperience of children, and as a shield to protect them against those who would take advantage of their condition.¹

¹ Voris, J., in *Quinn v. Ewart*, Summit Co. Com. Pleas.

Sec. 2115. Contributory negligence—Intoxication as affecting.

The plaintiff can not recover if he was himself in fault at the time, which contributed to his injury, and if you find that he was incapable of taking care of himself by the exercise of reasonable care, by reason of drink or any other cause, then he will not be entitled to recover. The plaintiff's claimed that intoxication, however, if proven, would not necessarily prevent recovery; but it bears upon the question whether or not he exercised reasonable and ordinary care, and if you find that he was intoxicated, and still find that he exercised reasonable and ordinary care to avoid the injury, but further find that, while he was negligent, such negligence did not contribute to the injury, that if the defendant was guilty of negligence, such negligence was not the proximate cause of his injury, the plaintiff would be entitled to your verdict.

If you find that the plaintiff was so intoxicated at the time of the accident as to disable him from exercising ordinary care, but find that at the time of the accident he was in charge and under the care of his son, who was at the time capable of exercising the ordinary care of an adult, and that he did exercise ordinary care under the circumstances, and if you find that the son was driving the vehicle, and that when approaching the crossing exercised ordinary care, and you further find that defendant's agents in charge of the train were guilty of negligence which produced the injury, then your finding should be for the plaintiff. On the other hand, if the plaintiff by reason of intoxication contributed to the injury complained of as a proximate cause thereof, that would prevent a recovery. This is a question of fact for you to determine.¹

¹ Gillmer, J., in *Flemming v. Penn. R. R. Co.*, Trumbull Co. Com. Pleas. Intoxication tends to show contributory negligence, and is matter for the jury. *Beach's Contr. Neg.*, sec. 197, citing *Seymour v. Lake*,

66 Wis. 651; *Ford v. Umatilla Co.*, 15 Ore. 313, etc.; *Sherman & Redf. on Neg.* (4th ed.), sec. 93.

Intoxication will not excuse one crossing a railroad track from the exercise of such care as is due care from a sober man. *Beach's Contrib. Neg.*, sec. 197; *Yarnall v. St. L., etc., R. R. Co.*, 75 Mo. 575; *Kean v. B. & O. R. R. Co.*, 61 Md. 154.

Sec. 2116. Contributory negligence—Husband performing duties as such not agent of wife.

If the deceased by his own negligence, or that of her agent, contributed to bring about her death, the defendant is not liable. If her husband acted as her agent in the purchase of the drug, then she is bound, and such an act would be an act to prevent a recovery in this case. But a purchase made by a husband for his wife in the discharge of his duty as a husband does not constitute him the agent of his wife. But in order to make the husband the agent of his wife, he must by her procurement and direction, and under her authority and control, have gone and made the purchase, and if he simply went in the discharge of his duty as a husband, he was not her agent in such a way that any carelessness of his could be attributed to her. If he was under her direction and control in such a way as to make him her agent, then his carelessness is her carelessness, and if he contributed by his negligence, the plaintiff can not recover here, for the plaintiff can only recover because the woman, had she lived, could recover.”¹

¹ From *Davis v. Guarnieri*, 45 O. S. 470. “The obtaining by the husband of food or medicine for his wife, with her knowledge and approval, does not of itself constitute such husband the agent of the wife in such sense as to charge her with his negligence. In order to make him the agent of the wife in such transaction, she must have selected the medicine, directed that he should purchase it, and he must have had nothing to do in the matter except by her procurement and direction. What he did in this matter simply in the discharge of his duty as a husband was not done as the agent of his wife, and his negligence in his duties as a husband are not chargeable to his wife.” *Davis v. Guarnieri*, 45 O. S. 470. See *Booth on Street Railways*, sec. 392.

Sec. 2117. Imputed negligence.

“The doctrine of imputed negligence does not prevail in Ohio; and if you find that the deceased died through the wrongful act, neglect, or default of the defendant, by himself or his agent, then the plaintiff is not deprived of the right of action in this case by reason of contributory negligence on the part of the husband or anyone else, unless such person was acting as agent of the deceased at the time.”¹

¹ From *Davis v. Guarnieri*, 45 O. S. 470.

Sec. 2118. Negligence—Of parent not imputed to child.

“If it be found that the plaintiff was fully capable of taking reasonable care of herself, and was injured while lawfully riding with her father in his own wagon, then the conduct of the father in driving the wagon, any negligence on his part, with which the plaintiff had nothing to do, can not be attributed to her in that respect, even though the father by his negligence may have so contributed to the accident that he would be barred from recovery by his contributory negligence, it still will not prevent the plaintiff from recovering, unless she herself contributed to the negligence which caused the injury.”¹

¹ From *Street Railway Co. v. Eadie*, 43 O. S. 91. See 28 O. S. 399, 24 O. S. 670, 30 O. S. 451; *Booth on Street Railways*, secs. 389, 390.

Sec. 2119. Duty of employer to infant employee.

“It is the duty of an infant employee to use ordinary care and prudence; just such care and prudence as a boy of his age of ordinary care and prudence would use under like or similar circumstances. The jury should take into consideration his age, the judgment and knowledge he possessed. If not understanding all the dangers and hazards of the situation in which he was placed by the foreman, and you find it was a dangerous and hazardous situation in which to place a boy of his age, judgment and experience, it was the duty of the foreman to instruct him in respect thereto, that he might conduct himself

so as to guard against such peril; and if he was injured by reason of the neglect or carelessness of the defendant, and by reason of his youth and want of judgment as to the perils of his position, did some act in the discharge of his duty as he understood it, which also contributed to the injury, and which he did not know to be likely to injure him, and had not been properly advised and instructed therein by the foreman, he is entitled to recover.’¹

¹ From *Rolling Mill v. Corrigan*, 46 O. S. 283.

Sec. 2120. The last clear chance doctrine.

Where the plaintiff, by his own negligence, has placed himself in a dangerous position, where injury is likely to result, and the servants and employees of the defendant company learned and knew of plaintiff's danger in time to have avoided injuring him by exercising ordinary and reasonable care, and it failed after discovering such peril [or if, after the defendant ought under the circumstances to have become aware of plaintiff's danger, it failed] to exercise reasonable care to avoid the injury, by slackening speed of the train [or car], or in stopping the train [or car] or to give signals or warnings; and this is true, and the rule is to be applied even though the plaintiff negligently remained in his perilous position down to the time of the accident. The principle of liability placed upon the one discovering the peril of another, though negligently caused by himself, is that the act of the one discovering such peril, and in failing to use reasonable care to avoid injury to such person, introduces a new and independent act of negligence, rendering such person, or the defendant, liable because such new and independent act of negligence becomes the direct and proximate cause of the injury.¹

¹ *Railroad v. Kassen*, 49 O. S. 230; *Bruggeman v. Railroad*, 147 Iowa, 187, 123 N. W. 1007, Ann. Cas. 1912, B. 876. In the latter case it was specially stated that plaintiff's negligence need not have ceased before the accident, in order to recover under the doctrine of last chance. In the *Kassen* case, however, the party was unable to remove from the track so that his negligence could not be said to

be continuing. In the adoption of the rule of concurrent negligence in *Drown v. Traction Co.*, 76 O. S. 234, it is specifically ruled that the doctrine of last chance as formulated in *Railroad Co. v. Kassen*, 49 O. S. 230, does not apply where the plaintiff has been negligent, and his negligence continues, and, concurrently with the negligence of defendant, directly contributes to produce the injury. It applies only where there is negligence of the defendant subsequent to, and not contemporaneous with, negligence by the plaintiff so that the negligence of defendant is clearly the proximate cause of the injury, and that of the plaintiff the remote cause. See *C. C. & St. L. Ry. v. Gahan*, 1 C. C. (N.S.) 205; *L. S. & M. S. Ry. v. Callahan*, 2 C. C. (N.S.) 326.

Sec. 2121. Concurrent negligence.

The jury is instructed that if it appears from the evidence that the plaintiff and the defendant were both negligent, and that the negligence of both directly contributed to cause the injury, that the negligent acts of both plaintiff and defendant combined so as to directly cause the injury complained of by plaintiff in such way that it is impossible for the jury to apportion the contributing part of each party to the injury, as well as the responsibility therefor, then plaintiff may not recover. In other words, if it should appear from the evidence that the negligent conduct of both plaintiff and defendant was active, from the beginning of the peril or danger to plaintiff, and that the negligence of each was contemporaneous and continuing in point of time until after the moment of the accident or injury, so that the jury are unable to consider the conduct of either party, apart from that of the other, and determine from the evidence whether the acts of the one were the proximate or immediate cause of the injury, while that of the other is remote, the plaintiff must fail, and the verdict should be for the defendant.¹

¹ This is a charge suggested by *Drown v. Traction Co.*, 76 O. S. 234, following that case in part and adding in part.

Sec. 2122. When negligence of plaintiff not continuing, but that of defendant is continuing and proximate, while that of plaintiff is remote.

But if the negligence of the plaintiff merely places himself in a place of danger doing nothing more, and he does not actively continue until the moment of the injury, and it appears from the evidence that the defendant either knew of his danger, or if by the exercise of reasonable and ordinary diligence and care, defendant could have learned and known of the peril and danger to plaintiff, and in either case plaintiff does not continue actively and concurrently negligent with defendant, but if it appears that the defendant notwithstanding the negligence it appears from the evidence that the defendant by the exercise of ordinary and reasonable care could have avoided the injury, and (his) or (its) neglect to do so was the proximate cause of the injury to plaintiff, while the negligence of the plaintiff was remote, your verdict should be for the plaintiff.¹

¹ This is a charge suggested to meet a phase of a question suggested in *Drown v. Traction Co.*, 76 O. S. on p. 248.

Sec 2123. Injury to passenger by derailment *res ipsa loquitur*—Establishing *prima facie* case.

The rule is that where a plaintiff has shown that he is a passenger of a carrier; that while such passenger, the car of the carrier upon which he was riding was derailed, and that he thereby sustained injury, the burden is upon the defendant to show that it was without its fault. Plaintiff having shown such a state of things as give rise to a presumption of negligence against the railroad company, this is available to plaintiff until negatived and overthrown. Such presumption can only be overthrown by proof that the casualty resulted from inevitable or unavoidable accident, against which no human skill, prudence, or foresight, as usually and practically applied to careful railroad management, could provide.¹

¹ *Louisville, etc., R. Co. v. Jones*, 108 Ind. 558; *Wash. & Va. R. R. Co. v. Bouknight*, 113 Va. 696, 75 N. E. 1032, *Am. Ann. Cas.* 1913, E. 546.

Sec. 2124. Burden of proof when injury caused by *res ipsa loquitur*.

Where it is shown that a person has sustained an injury, under circumstances where the maxim *res ipsa loquitur* applies, the plaintiff is not required, in the first instance, to prove any particular defect by evidence, other than by the *prima facie* presumption which the law creates in his favor. In other words, the burden of proof is upon plaintiff to prove merely how the injury occurred, which constitutes in such case a *prima facie* case, although the facts with respect to the defects are necessarily alleged with particularity in the petition. This satisfies the rule of the burden of proof, which technically is the rule of procedure of going forward with the evidence. So in an action by a passenger against a carrier for personal injuries received by the derailment of the car in which the plaintiff was riding, the plaintiff makes out a *prima facie* case by proving the happening of the accident and his injury, and thereby casts upon the defendant the burden of rebuttal, and of explaining the circumstances of the accident so as to relieve itself from liability.

But if defendant introduces countervailing evidence in rebuttal of such *prima facie* case, the burden is on the whole case on the plaintiff to prove by a preponderance of the evidence that the injury was caused by the negligence of the defendant.¹

¹ Wash. & Va. Ry. v. Bouknight, 113 Va. 696, 75 N. E. 1032, Am. Ann. Cas. 1913, E. 546. In the case cited it is held that it is for the jury to determine whether defendant has shown by a preponderance of the evidence that it was free from negligence. But under the Ohio decisions the burden on the whole case remains on plaintiff though his evidence in the first instance makes out a *prima facie* case. See *ante*, secs. 529, 530.

Sec. 2125. Sudden peril—Conduct of person placed in.

You are instructed that the law is that where a traveler, without any fault on his part, is placed in a position of imminent peril at a crossing, he will not be held guilty of such negligence as will defeat his recovery if he does not select the very wisest course; and an honest mistake of judgment in such a

sudden emergency will not of itself constitute contributory negligence on his part, although it may appear that another course would have been better and safer; and this rule applies where the person is placed in such perilous position by the negligence of a railroad company in failing to give the proper signals. In such emergency of sudden peril, all that is required of such traveler is that he act with ordinary care under the circumstances. It is for the jury to determine whether plaintiff was placed in a position of peril through the neglect of the defendant, and, if so, whether plaintiff acted negligently or with ordinary care, etc.¹

¹ *Dickinson v. Erie R. Co.*, 81 N. J. L. 464, 37 L. R. A. (N.S.) 150, 81 Atl. 104.

Sec. 2126. Rescuing one from danger—Injury while attempting to rescue—Contributory negligence.

“To hold the railroad company responsible in damages for injury to a person who is struck by an engine and injured while in the act of crossing the track and rescuing a little child from danger and saving its life, it must be shown (1) that the child was in danger of being run over and injured by an approaching engine, and that such danger was caused or created by the negligence of the railroad company; and (2) that in making the effort to rescue the child the plaintiff was not guilty of contributory negligence. These are questions of fact which it will be your duty to determine from the evidence.

“If you find that the peril to which the child was exposed was caused by such negligence of the company, you will then inquire whether the plaintiff, in passing across the track and attempting to rescue the child, was guilty of contributory negligence. The law will not impute negligence to an effort to save human life unless made under such circumstances as to constitute rashness in the judgment of prudent persons.

“If he believed, and had good reason to believe, that he could save the life of the child without serious injury to himself, the law will not impute to him blame for making the effort.”¹

¹ Penna. Company v. Langendorf, 48 O. S. 316. In the opinion in the above case, Bradbury, J., says: "The attendant circumstances must be regarded; the alarm, the excitement and confusion usually present on such occasion, the uncertainty as to the proper move to be made, the promptness required, and the liability to mistake as to what is best to be done, suggest that much latitude of judgment should be allowed to those who are thus forced by the strongest dictates of humanity to decide and act in sudden emergencies. And the doctrine that one, who, under these or similar circumstances, springs to the rescue of another, thereby encountering even greater danger to himself, is guilty of negligence *per se*, is neither supported by principle nor authority."

Sec. 2127. Law designs to hold the one whose conduct causes injury, whether plaintiff or defendant. It is the nature of man to protect himself, and this is the measure of duty in law.

In cases of negligence the law designs that the one whose conduct causes the injury shall be held responsible for the consequences thereof. If the conduct of the defendant, measured by the tests of law, is the one that is responsible, then, of course, the judgment must go against it. If the conduct of the plaintiff himself was the cause of the injury, then, of course, he has no right to recover.

The nature of human rights and justice suggests this test of right of recovery and of defense. It is natural to hold one responsible for the natural consequences of his own act, no matter what the circumstances may be. However, anyone might feel that a result might be otherwise, the law can not rest upon any other basis whatever than the one test of who was at fault.

It is a part of the very nature of man to take such precautions as are reasonably calculated to protect himself; and hence the measure of duty which the law imposes upon him and exacts of him is that he shall use such care for his own protection and safety as ordinarily prudent persons would have done under the same circumstances. If he fails to do this, his act will constitute negligence. And if his acts constitute and are the efficient cause of the injury, then, of course, he can not recover.

On the other hand, human rights and the law requires that every person shall observe such care as may be reasonably calculated to avoid or prevent injury to another person who is himself in the due, proper and ordinary exercise of care for his own protection. Hence, the measure of duty required in such case is the observance of ordinary care to avoid and prevent injury to such other person.

A violation of this duty resulting in the direct cause of the injury constitutes negligence. This was the obligation resting upon the defendant in this case. And while a corporation is an artificial body and, as they sometimes say in argument to a jury that it has no soul, has no conscience, etc., nevertheless we must act upon the same presumptions and the same rules of law with respect to those persons who are in charge of its affairs. It is human nature for anyone to not wish to injure another intentionally or carelessly, and it must appear, therefore, that they have thoughtlessly or carelessly neglected to do something that was reasonably calculated to protect another person and to prevent injuring him, in order to make them liable.

CHAPTER CXXII.

NEGLIGENCE—MISCELLANEOUS CASES.

SEC.

2128. Injury from defective gun.
2129. Charge that gun was negligently carried, thus causing death.
2130. Liability of owner of race-track for injury to driver from defect in track.
2131. Same—Negligence of defendant must proximately cause injury.
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2139. Traction engine in highway lawful—No liability from ordinary use—Not bound to be on lookout for frightened horses in field—Owner or operator liable for wanton or unnecessary sounding whistle.

Sec. 2128. Injury from defective gun.

The action from which the following is taken was one for negligence for wrongful death caused by a defective gun, which, on account of the defect therein, discharged while in the hands of the defendant, killing the deceased who was a little in advance of the defendant.

In your investigation of matters which are here submitted to you, you will first proceed to inquire and determine whether or not this gun was defective. If you find that it was not, upon this branch of the case the defendant will be entitled to a find-

ing in his favor. If you find that it was thus defective, then you are to inquire and ascertain whether or not the defendant had knowledge of its defective condition; or if he had not actual knowledge, would he by the exercise of ordinary care have known of this defective condition? If you find that he neither had knowledge, nor by the exercise of such ordinary care would not have known of the defects claimed on the part of the plaintiff to exist in this gun, then upon the question as to the defective gun alone being the cause of the accident, the defendant would be entitled to a finding in his favor; if on the other hand you find that this gun was defective in the particulars complained of, and that the defendant knew of this defect, or by exercising ordinary care would have known of the defect, then upon this branch of the case the plaintiff would be entitled to a finding in her favor.¹

¹ Johnston, J., in *Lechleitner v. King*, Trumbull Co. Com. Pleas.

Sec. 2129. Charge that gun was negligently carried, thus causing death.

It was the duty of the defendant in carrying the gun to exercise ordinary care for the safety of the deceased; and if his failure to exercise such care was the proximate cause of the injury resulting in the death of the deceased, then the plaintiff will be entitled to recover in this case, provided you find that the deceased himself was in the exercise of ordinary care at that time. It was the duty of the deceased to exercise ordinary care for his own safety, and if you find that he failed to exercise such care, and that his failure to thus exercise such care contributed to produce or cause the injury resulting in his death, then the plaintiff would not be entitled to recover in this action.¹

¹ Johnston, J., in *Lechleitner v. King*, Trumbull Co. Com. Pleas.

Sec. 2130. Liability of owner of racetrack for injury to driver from defect in track.

A defendant, by advertising a fair and horseraces to take place on his racetrack, and offering premiums to winners of such

aces, invited those persons desiring to compete for such premiums to enter their horses in such races and to employ persons to ride their horses in such races; and by that action on his part a defendant impliedly warranted to all such persons and riders that his track was reasonably well constructed for the purpose for which it was to be used, and that ordinary care had been used by him to protect and guard it against danger to those engaged in riding horses in said race.

And the plaintiff, if he had no knowledge to the contrary, might rely upon such warrant. And the defendant will be charged in law with a knowledge of the existence of any and all defects which were open to inspection, and which might have been discovered by a man of ordinary prudence and care. He was required to provide the track with such appliances as ordinary care and prudence suggested to avert danger and secure a reasonable safety to others coming upon or using said track at his invitation or request.

Therefore, if leaving the bank along the defendant's track, at the point where the accident happened, without any protection or guard, rendered it unsafe to riders and to racehorses over said track at that point, and unreasonably exposed said riders to danger of accident by reason of such condition of the bank, and if ordinary care, that is, such care as prudent men ordinarily employ in similar matters, required that the defendant should have provided some means by fencing along or otherwise guarding said point to prevent accident or injury, then his omission to provide some such means would be negligence on the part of the defendant.¹

¹ Newby, J., in *Palen v. Thomas*, Highland Co. Com. Pleas.

Sec. 2131. Same—Negligence of defendant must proximately cause injury.

In order that the defendant's negligence may be said to be the proximate cause of the injury, the plaintiff is required to make it appear, by a preponderance of the evidence, that had the defendant exercised ordinary care in the construction and guarding of

the track the accident would not have happened, and that the injury inflicted was the result of the defendant's carelessness in not guarding the defect complained of, and was an injury such as might have been foreseen and reasonably anticipated as likely to result from such carelessness. Therefore, if the horse which plaintiff was riding did not stumble against the bank, but was tipped or knocked down by another horse in the race, then the plaintiff can not recover, although the defendant may have been negligent in the manner above stated. The defendant was not the insurer of the plaintiff's safety, nor is he responsible for the negligence of other riders with the plaintiff in the race.¹

¹Newby, J., in *Palen v. Thomas*, Highland Co. Com. Pleas.

Sec. 2132. Same—Diligence required of plaintiff.

Although the defendant may have been guilty of negligence, still the plaintiff can not recover if he knew of, or had reasonable means of ascertaining, the defect complained of. The plaintiff was not allowed to shut his eyes to the circumstances and conditions surrounding him. But he will be charged with knowing whatever he would have discovered, as to the condition of the track, had he employed ordinary prudence and caution for that purpose.

The degree of diligence and care which the law required the plaintiff to exercise was such as one of his age and experience would ordinarily exercise under the circumstances, to look for and ascertain the dangers incident to his employment. And if the plaintiff saw, or by the exercise of such diligence could have discovered, the unprotected and exposed condition of the track before he was injured in it, and have avoided the injury, it was his duty to quit the employment. If he continued in the employment after knowing or being thus charged with a knowledge of the danger, he will be held to have assumed all the risk of such danger, and in such case he can not recover, although the defendant may have been negligent also.¹

¹Newby, J., in *Palen v. Thomas*, Highland Co. Com. Pleas.

Sec. 2133. Liability of county for injury by a mob.

The statutes of this state declare, in substance, that any collection of individuals assembled for any unlawful purpose, intending to do damage or injury to anyone, or pretending to exercise correctional power over other persons by violence and without authority of law, shall, for the purposes of the act, be regarded as a mob. The act also provides that any act of violence exercised by them upon the body of any person shall constitute a lynching. Thus we have a definition, a statutory definition, of a mob and of a lynching, to control us in this case.

The statutes further declare that any person assaulted by a mob and suffering a lynching at their hands shall be entitled to recover from the county in which the assault is made any sum not to exceed \$——.

The suit in question is planted under these statutes.

The court instructs you that before the plaintiff is entitled to recover a verdict at your hands, there are certain material allegations in the petition which are controverted by the answer, that the plaintiff must prove by a preponderance of the evidence. These material allegations are these:

First: That the plaintiff was assaulted by a mob, defining a mob as defined by the statutes, that is, by a collection of individuals assembled for an unlawful purpose, intending to do damage or injury to any one, or pretending to exercise correctional power over other persons by violence, and without authority of law.

Second: That the plaintiff suffered a lynching at the hands of such mob; that is, that the mob exercised some act of violence upon the body of the plaintiff; and, as I have heretofore said to you, a lynching consists in an act of violence exercised by a mob upon the body of any person.

Third: That the alleged assault and lynching at the hands of said mob occurred in this country about the time alleged in the petition. The exact time is not important.

If these three essential elements are proved by a preponderance of the evidence, the plaintiff is entitled to a verdict; but if

the plaintiff has failed to so prove any one or more of said elements, he is not entitled to a verdict, and the verdict should be for the defendant.

By a preponderance of the evidence is meant the greater weight of the evidence.

The court further instructs you that while it is essential that the alleged assault, if it occurred, be made by a mob, yet, if there was a collection of individuals assembled at or near the corner of — street and L. avenue for the unlawful purpose and intention of damaging or injuring anyone, or of exercising correctional power over others by violence and without authority of law, and if in furtherance of the unlawful purpose on the part of such mob, any one of said mob actually made the assault upon the plaintiff, it is a sufficient assault by the mob. * * *

In like manner, if a mob had assembled at or near the corner of — and L— Ave., as alleged, with the unlawful purpose and intent of exercising acts of violence upon the body of any person, and one of their number at the time and place of the assemblage, in furtherance of their common design, exercised acts of violence on the body of the plaintiff by striking him on the legs as alleged, it constitutes a lynching by such mob.

The Court further instructs you that to constitute a mob, it is essential to prove that the collection of individuals was assembled for an unlawful purpose, as heretofore stated, or being assembled for a lawful purpose, while so assembled, determined among themselves to do some unlawful acts.

Now, purpose or intent are operations of the mind, and are not usually proved by direct or positive evidence. Persons do not usually declare that they have assembled or gathered together for unlawful purposes, so that intent and purpose are usually proved by indirect or circumstantial evidence.

You will, therefore, in determining whether the assemblage was gathered for an unlawful purpose, or, after being gathered, determined to do an unlawful act, perform some unlawful act, consider the acts, conduct and declarations of the persons whose intent is sought to be proved, as reflecting upon the purpose and

intent of the persons collected together, if there were such persons, together with all the other facts and circumstances surrounding them, prior to and at the time and subsequent to the alleged assault, if it occurred, and determine whether the collection of individuals, if assembled, as alleged, were present with an unlawful purpose or intent either to damage or injure anyone, or to exercise correctional power over others with violence and without lawful authority.

If the plaintiff was struck by a stone, as alleged, and you should conclude that the person who struck him was not a member of a mob, as I have heretofore defined it to you, but acted independently of a mob, then the plaintiff can not recover in this case; for the plaintiff recovers under the statutes, if at all, for mob violence upon him, by some one of the mob who may have attacked him or assaulted him with a stone or other weapon, as the case might be, and he can not recover if it was some independent act of some person who was not acting in conjunction with the mob.

Gentlemen, the Court further instructs you that if there was a collection of persons assembled as set forth in the petition, for an unlawful purpose, either intending to damage or injure others, or to exercise correctional powers over others by violence and without authority of law, even though the collection of persons did not specifically intend to injure this plaintiff, if such a collection of persons did injure this plaintiff, the defendant is liable, if the mob or collection of persons had the general intent to injure persons in that immediate locality.¹

¹ *Hoover v. Gibson*, Franklin Co. Com. Pleas, Rogers, J.

Sec. 2134. Injury from natural gas explosion—Independent contractor—Rule of respondeat superior not applicable.

The liability of one person for damages arising from the negligence of another, or the principle of *respondeat superior*, is confined in its application to the relation of master and servant, or principal and agent, and does not extend to cases of inde-

pendent contracts not creating those relations, and where the employer does not retain control over the mode and manner of the performance of the work under the contract.

But where the employer retains control and direction over the mode and manner of doing the work, and an injury results from the negligence or misconduct of the contractor, or his servant or agent, the employer is placed under a liability equal and similar to that which exists in the ordinary case of principal and agent.

Although the defendant is not liable for the negligence of its independent contractor where it retained no control over the mode and manner of the performance of the work contracted for, yet it may be liable, if it was itself guilty of negligence in allowing or permitting said natural gas to escape through a defectively laid or jointed gas-pipe or main. If, by the exercise of ordinary care and prudence, it could have discovered such defect, and it did not do so, it was guilty of negligence. It was not bound to know that such defect existed, but it was required to use ordinary care and prudence to prevent accidents and injuries to others, and whether it used that degree of care and prudence which men of ordinary care and prudence are accustomed to use under the same or similar circumstances, is a question for the jury to determine. If it did, it is not liable. But if it failed and neglected to use ordinary care, it was negligent, and, if its negligence was the proximate cause of the injury complained of, the plaintiff is entitled to recover, unless he has himself been guilty of contributory negligence.¹

¹ Central Ohio Natural Gas & Fuel Co. v. Baker, supreme court, affirmed. Evans, J., Franklin Co. Com. Pleas.

Sec. 2135. Same—Injury from failure to close and calk pipes.

If the evidence shall fail to show by a preponderance that the defendant was guilty of negligence in either of said particulars, your verdict must be for the defendant. If, however, it shows by a preponderance thereof that the defendant was guilty of

negligence in either of said alleged particulars, and that its negligence in that respect was the proximate cause of the injury complained of by the plaintiff in his petition, the defendant is liable.

If the evidence shall show that the gas escaped from one or more of the joints of the gas-pipe or main, and that it caused an explosion and an injury to the plaintiff, such facts alone do not raise any presumption, nor do they tend to prove that the defendant was guilty of negligence, and before you can find that it was, the evidence must show that it failed and neglected to use and employ that degree of care and prudence which persons of ordinary care and prudence are accustomed to use and employ under the same circumstances. If it used such degree of care, it is not guilty of negligence. But if it failed to use such care, it was guilty of negligence.

¹ From Central Ohio Natural Gas & Fuel Co. v. Baker, supreme court, affirmed. By Evans, J., Franklin Com. Pleas.

Sec. 2136. Injury from explosion of boiler.

If the plaintiff was without fault on his part, and was injured by the explosion of a boiler operated by the defendants, or their servant or agent, the mere fact of such explosion raises a presumption of negligence on the part of the defendants. This presumption is only *prima facie*, however, and not conclusive; that is, the plaintiff will be entitled to recover on such presumption, unless the defendants, by a preponderance of evidence, show that they exercised ordinary care and prudence, that is, such care and prudence as is ordinarily exercised by men of ordinary prudence under like circumstances. It was the duty of the defendants to furnish a competent engineer to run said engine and boiler, and if the plaintiff was injured by reason of the incompetency of the engineer, the plaintiff can recover, if he was without fault himself. If you find from the evidence that plaintiff's injury was caused by the explosion of the steam boiler operated by and belonging to the defendants, they must

show by preponderance of proof the competency of their engineer. If, however, it be shown that the defendants' engineer was competent, yet if he, by any carelessness or neglect on his part, caused the explosion and injured plaintiff, he can recover, if plaintiff was without fault on his part. The engineer must not only have been competent, but he must not have failed to exercise his competency with proper care and skill. Was there any want of care on the part of the engineer in the management of said boiler at the time of said explosion? In determining this you will inquire was there a lack of water in the boiler, and what was the pressure of steam in the boiler at the time, and whether it was excessive. Of course, if the plaintiff was himself acting as engineer at the time, and neglected to exercise due and ordinary care, he can not recover. It was also the duty of the defendants to furnish machinery reasonably proper and fit for the purpose for which it was used. If there was any defect in the engine or boiler which the defendants knew of, or of which they might have known by the exercise of reasonable care and diligence, and the plaintiff was injured by reason of such defect, he will be entitled to recover. This does not, however, relate to the lack of power in the engine to operate the said mill.¹

¹ From *Huff v. Austin*, supreme court, affirmed. Price, J., Logan county.

Sec. 2137. Collision between street car and steam railway engine at crossing—Action for damage to street car.

1. *Duty of each party.*
2. *Ordinances as to speed.*
3. *Failure to sound whistle.*
4. *Gateman—Open gate an invitation to proceed—Did not absolve driver of car from exercising due care.*

1. *Duty of each party.* The defendant was bound to exercise ordinary care towards the plaintiff in running and operating

its locomotive upon and along its track, and in crossing the track of the street railway of the plaintiff, and the plaintiff was bound to use ordinary care on its part in crossing the railroad track of the defendant.

2. *Ordinances as to speed.* In determining the questions, you should carefully consider the ordinances of the city of Y., one of which requires the locomotives passing through the city limits to run at a speed less than six miles per hour, and if you should find at the time of the collision the engine was being run by the defendant at a speed greater than six miles an hour, this fact alone would not be sufficient evidence to entitle the plaintiff to recover, yet it is competent evidence to be considered by you in connection with the other evidence adduced, as to whether or not the engine was being run at a dangerous rate of speed, and whether or not the defendant is liable for negligence or want of care on that occasion.

3. *Failure to sound whistle.* Neither would the failure to sound the whistle of the locomotive, unless you find that the defendant by sounding the whistle could have avoided the collision with the car of the plaintiff, and that the failure to sound the same was negligence on the part of the defendant, which resulted in injury to the plaintiff.

4. *Gateman—Open gate an invitation to proceed—Did not absolve driver of car from exercising due care.* And if you find that the defendant maintained the gate at that crossing, and that the same was in charge of a gateman placed there by the defendant, the plaintiff though driver of the street car, had a right to rely upon the gateman properly discharging his duty; and if the driver of the street car, upon approaching the crossing, found the gate open, it was an invitation to him to proceed, and it indicated to him that the track was then clear, and that he might proceed with safety; but he had no right to blindly rely upon this fact, and rush into danger which he saw or heard, or which, by the exercise of ordinary care, he might have seen and heard; and it did not absolve him from the duty of

exercising ordinary care upon his part in entering upon the crossing and in crossing the track of the defendant. Notwithstanding this fact, the driver was bound to exercise his senses, to look and listen, and to take all such precautions as ordinarily prudent persons ordinarily exercise under the same or similar circumstances, to stop his car or proceed promptly across the track, whichever, under all circumstances, ordinarily prudent persons would have done; and if he did that which ordinarily prudent persons, under the same or similar circumstances, would not have done, or omitted to do that which ordinarily prudent persons would have done under the same or similar circumstances, and this act or omission on his part contributed to the damage which the plaintiff sustained, then the plaintiff could not recover, even though the defendant was negligent in having the gate open at that time.¹

¹ Johnston, J., in *Youngstown Street Railway Co. v. N. Y. L. E. & W. R. R. Co.*

Sec. 2138. Injury to passenger from collision between cars on scenic railway in public park.

If the plaintiff took passage in one of the defendant's cars and paid the usual fare for riding, with the intention as contemplated by both parties, of carrying her over the course of said railway to the original starting point, it was the duty of the defendant, and she had the right to assume that the defendant would exercise ordinary care in the management and operation of the said railway, including the car and track on which she was riding, in order to prevent a collision of such car with another on said track; and if the collision as alleged, occurred in the manner alleged in the petition, while defendant was in control and management of the device known as the scenic railway including the car with which the car in which the plaintiff alleges to have been riding collided, and if from the character, management and circumstances of said collision you find that the collision was such as in the ordinary course

of things would not have happened if the defendant had exercised ordinary care in the management of said railway and of the operation of the cars and track in connection therewith, you are justified in finding that such accident resulted from want of care on the defendant's part; or in other words, that the defendant was negligent in the particular mentioned in said petition, unless the defendant by at least an equal weight of countervailing evidence adduced, shows that the accident did not occur by reason of a want of ordinary care on its part, but occurred notwithstanding its exercise of ordinary care at the time of the accident. Whether or not the character, manner and circumstances of the alleged accident as shown by the evidence adduced justifies you in drawing the inference that the defendant was guilty of negligence in the particular alleged in the petition, and if so, whether or not the defendant has rebutted such negligence by an equal weight of countervailing evidence showing that notwithstanding said accident it exercised ordinary care in the premises, are matters entirely left to your judgment.

If you determine from the evidence that the manner and circumstances of the accident raise a reasonable inference that the defendant was negligent as alleged in the petition and that no sufficient explanation of the accident by evidence on the part of the defendant, of equal weight to that of the plaintiff on the question of negligence, has been made, showing that notwithstanding the occurrence of the collision the defendant exercised ordinary care, it will be your duty to find that the defendant was negligent in the particular complained of. But if you determine either that the manner and character of the accident do not raise a reasonable inference of negligence as alleged against it, or although the manner and character of the accident raises a reasonable inference of defendant's negligence, such negligence has been rebutted by at least an equal weight of evidence on the part of the defendant showing that notwithstanding the accident the defendant exercised ordinary care,

you will find that the defendant was not negligent in the particular as alleged, and you will return a verdict for the defendant.¹

¹ *Chambers v. The Olentangy Park Co.*, Com. Pleas Court, Franklin Co., O. Rogers, J.

Sec. 2139. Traction engine in highway lawful—No liability from ordinary use—Not bound to be on lookout for frightened horses in field—Owner or operator liable for wanton or unnecessary sounding whistle.

The jury is instructed that the operation of a traction engine as under the circumstances appearing in the evidence in this case, was a lawful, legitimate business, and that the defendant had the right to operate it and engage in the work that they were doing at the time. There can be no liability on the part of the defendant for any consequences of the injury by the usual, ordinary and reasonable operation of the engine, when, for instance, the defendant has done nothing unusual, nothing out of the ordinary, nothing beyond what was reasonably and ordinarily necessary to be done in the management and in the operation of the engine and including the matter of the blowing of the whistle.

The defendant can not be held bound to be on the lookout for the ordinary fright of horses in a field or by reason of the passage of the engine, nor by reason of the ordinary and reasonably necessary blowing of the whistle, in pursuance of some duty and purpose to be accomplished by blowing the whistle. The defendant can be held only for extraordinary consequences, only for the wanton and unnecessary sounding of the whistle, sounding of the whistle when it is not reasonably necessary to accomplish some purpose but is carelessly, wantonly and uselessly sounded.

Now I think that I should say to you that in addition to what I have said that it is not the duty of the defendant to keep on

the lookout for the ordinary frightening of animals; that the defendant would not be liable for the injury to the horse unless after discovering its fright and seeing the horse in a frightened condition that he blew the whistle under those circumstances unnecessarily, and even necessarily if he could just as well have avoided it and accomplished his purpose in some other reasonable manner. In order to find the defendant guilty I do not know but what you would have to find from the evidence that he could have reasonably anticipated the consequences of the fright to the animal. A man operating a traction engine under such circumstances could not ordinarily and usually be held to anticipate that an animal would become frightened and kill itself from the ordinary use of the engine. If the horse or the horses were already frightened by the operation of the engine or by the running of the engine, the jury may consider whether the blowing of the whistle added perceptibly to their fright, or materially contributed to the injury, and whether the defendant could reasonably have anticipated that the horse would do more than run around in the field; whether if the whistle had not been blown the horse was already in such frightened condition that he might or could have injured himself in the manner in which he was.

Negligence is the absence of care under the particular circumstances. And, of course, the question which I have submitted to you here is whether or not the defendant was ordinarily prudent or whether or not he was guilty of a lack of prudence under the peculiar circumstances of this case, and whether that lack of prudence, if any there was, was the direct and immediate cause of the death of the animal.

I have endeavored to make it clear, if I have not, that my view of the law is that the defendant is not bound to keep a lookout for the frightening of the horses. Of course he has his own duties to perform in the operation of the engine, and if he did not know that the horse was in a frightened condition and blew the whistle, not knowing that, or if he could not have

reasonably known of its fright and blew the whistle under such circumstances, there would be no liability. But if he did know and saw the frightened condition, and if the jury believe that if the whistle had not been blown under such circumstances and it was unnecessarily blown, then he would be liable.

If you find for the plaintiff you will assess the amount of the value of the horse together with any expenses that the plaintiff may have incurred for caring for the horse after the injury, and fix the amount in your verdict.¹

If you find for the defendant you will simply say so.

¹ Hunter v. Koehler, Franklin Co. Com. Pleas. Kinkead, J. This is a novel case. It is given as a suggestion.

CHAPTER CXXIII.

NUISANCE.

(For Streets, Sidewalks, Excavations, involving liability of municipality, see Chapter ———, MUNICIPAL CORPORATIONS.)

SEC.

2140. N u i s a n c e—Comprehensive view and definition of wrong.

2141. Definition—Another form.

2142. Modern statutory definition.

2143. There must be actual injury more than a mere tendency.

2144. Degree of annoyance to constitute.

2145. Liability of property owner for injury to traveler from opening or excavation in street adjoining.

1. Dominion over property by owner—May exclude persons from it.

2. Duty of traveler on highway.

3. Private road.

SEC.

2146. Duty of lot owner where an excavation made in sidewalk in front of premises by contractor.

2147. Responsibility of lot owner for excavation made in premises in front of premises by independent contractor.

2148. Duty of traveler on highway—May presume city has performed its duty with reference to streets—Lights and guards in streets.

2149. Adjoining landowners, rights and obligations of, to each other. To what extent lower proprietor may dig.

Sec. 2140. Nuisance—Comprehensive view and definition of wrong.

Nuisance, as a wrong in law is to be distinguished from negligence. The boundary, or dividing line between the two may at times be obscure and difficult to discern, because nuisance involves and includes acts of negligence. The wrong is so general and comprehensive in relation to the acts and conditions which it embraces that a specific definition made to cover a given case may not include all acts and conditions which it may

in general embrace. An attempt to define all nuisances is to describe the infinite variety of ways in which one may be annoyed or impeded in the enjoyment of his rights which are injured by the wrong designated in law as nuisance.

Generally speaking, anything not authorized by law which maketh hurt, inconvenience or damage is held to be a nuisance. But such conception of the wrong ignores the element which distinguishes it from negligence and marks the dividing line between the two.

This element or characteristic is the duration or continuance of the acts or conditions, the period of time which a condition or situation is allowed by continuous neglect or omission to exist or remain, so as to menace and injure the rights of others.

An act of negligence is specific and definite, and when committed, a right of action arises at once in favor of one injured thereby.

On the other hand, the maintenance of a nuisance implies negligence and worse. It may begin with a specific act of negligence while the wrong becomes complete and existing by continuous acts of omission and neglect.

So in a general way it may be said that nuisance consists of continuous neglects or omissions in the use, care or management of property, streets, highways, or of acts of commission in the use of property, or in carrying on a trade, or in the exercise of proprietary rights, whereby another is injured in his person, health, personal comfort or property.

There are three rights which may be injured by nuisance, viz.: the right of person, the right of personal comfort, and the right of property.

To particularize further, such rights, or either of them, must be actually injured to some appreciable, tangible or measurable extent. And this is to be decided by the jury according to the notions of comfort and convenience entertained by persons generally of ordinary tastes, and as shown by the evidence. The jury are not allowed to speculate and conjecture outside of the evidence, according to the individual notion or view of men

composing the panel, but must instead be governed by the evidence admitted, and the law applicable.

[Then may follow an instruction to the particular case in hand.]

Sec. 2141. Definition—Another form.

“The term nuisance, derived from the French word ‘*nuire*,’ to do hurt, or to annoy, is applied indiscriminately to infringements upon the enjoyment of proprietary and personal rights.”¹

Nuisance, something noxious or offensive. Anything not authorized by law, which maketh hurt, inconvenience, or damage.²

By hurt or annoyance is meant not a physical injury to the owner or possessor thereof, as respects his dealing with, possessing or enjoying them.³ “Nuisance is a distinct civil wrong, consisting of anything wrongfully done or permitted which interferes with or annoys another in the enjoyment of his legal rights.”⁴

If an individual or corporation (municipal or private) upon whom is imposed the burden of keeping a highway in repair, permit the same to be out of repair so as seriously to interfere with convenient transit over the same, it is a nuisance, subjecting the person or corporation to damages at the suit of persons injured by reason of such defects or want of repair.⁵

To constitute a nuisance, there must be a material or substantial injury, and not an imaginative one. It may be difficult in some cases to ascertain whether the injury be material; but it is a question for the jury to consider and determine.⁶

Hence to entitle plaintiff to recover in this action, you must find from a preponderance of the evidence that he has suffered a real, material, and substantial injury, and it is left for you to determine what amounts to such an injury.⁷

¹ Addison on Torts, 361.

² 46 O. S. 446.

³ Cooley on Torts, 670.

⁴ See Bishop's Non. Cont., sec. 411, note; Cooley on Torts, 670 (565).

A precise definition is impracticable, 12 O. S. 398.

⁵ Wood on Nuisance, sec. 307; Cardington v. Fredericks, 46 O. S. 442.

⁶ *Cooper v. Hull*, 5 O. S. 321, 23, 24.

⁷ *Cols. Gas, etc., Co. v. Freeland*, 12 O. S. 400.

The question of nuisance *vel non* can not be determined by reference to the rules of the common law, but each case must be considered on its own facts. A thing may or may not be a nuisance according to the manner in which it is placed, or the time it has been carried on without complaint, when measured by the mind and taste of the average citizen. *Densmore v. Evergreen Camp*, 61 Wash. 230, 112 Pac. 255, Ann. Cas. 1912, B. 1206.

Sec. 2142. Modern statutory definition.

A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either annoys, injures or endangers the comfort, repose, health or safety of others, offends decency, or in any way renders other persons insecure in life or in the use of property.¹

¹ A statutory definition, see *Everett v. Paschall*, 61 Wash. 47, 111 Pac. 879, Ann. Cas. 1912, B. 1128.

Under this statute a private sanitarium for the treatment of tuberculosis patients in a residential section of a city is a nuisance. *Everett v. Paschall*, 61 Wash. 47, 111 Pac. 879, Ann. Cas. 1912, B. 1128; *Shepard v. Seattle*, 59 Wash. 363, 109 Pac. 1067. Dense smoke only becomes a nuisance when it permeates the air surrounding people and invades their residences and places of occupation. *State v. Railway*, 114 Minn. 122, 130 N. W. 545, Ann. Cas. 1912, B. 1030.

Sec. 2143. There must be actual injury—More than mere tendency.

Nuisance is a question of degree, depending upon varying circumstances. There must be more than a tendency to injure; there must be something appreciable, tangible, actual, measurable. In all cases in determining whether the injury charged comes within these general terms, resort should be had to sound common sense. Each case must be judged by itself. Regard must be had for the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities. The nuisance and discomfort must affect the ordinary comfort of human existence as understood by the people in the present state of enlightenment. The theories of scientific

men, though provable by scientific reference, can not be controlling unless shared by people generally.¹

¹ *Everett v. Paschall*, 61 Wash. 47, 111 Pac. 879, Ann. Cas. 1912, B. 1128; *Joyce on Nuisances*, 19; *Cols. Gas Light Co. v. Freeland*, 12 O. S. 392; *Grover v. Zook*, 44 Wash. 494, 12 Ann. Cas. 192, 7 L. R. A. (N.S.) 582, 120 Am. St. 1012.

Sec. 2144. Degree of annoyance to constitute.

What amount of annoyance or inconvenience will constitute a legal injury, resulting in actual damage, is a question of degree, and must necessarily be dependent upon varying circumstances, and can not be precisely defined as matter of law, but must be left to the good sense and sound discretion of the jury.¹ The court can only give you a rule which will serve as a guard against an unreasonable exercise of that discretion. You must be guided by the ordinary standard of comfort and convenience, and not by particular or exceptional above or below the ordinary standard. Regard should be had to the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities. What such persons would not regard as an inconvenience materially interfering with their physical comfort, may be properly attributed, when alleged to be a nuisance, to the fancy or fastidious taste of the party. On the other hand, the charge of nuisance, if it be of a thing offensive to persons generally, can not be escaped by showing that to some persons it is not at all unpleasant or disagreeable.²

By a material injury is meant one resulting in damages of a substantial character or nature, not merely nominal, and which are, in some cases, awarded to prevent a wrong from ripening into a right by lapse of time.³

¹ 5 Ohio, 323, 12 O. S. 399.

² *Cols. Gas, etc., Co. v. Freeland*, 12 O. S. 392, 399; see *Bishop's Non-Cont. Law*, sec. 416, 44 O. S. 279, 22 O. S. 247, 253.

³ *Crawford v. Rambo*, 44 O. S. 279.

Damages may be awarded when the circumstances would not entitle the injured to an injunction. *Id.* *Jaggard on Torts*, 808. As to what will be allowed by way of damages, see *Id.* 808, 809.

Sec. 2145. Liability of property owner for injury to traveler from opening or exavation in street adjoining.

1. *Dominion over property by owner—May exclude persons from it.*
2. *Duty of traveler on highway.*
3. *Private road.*

1. *Dominion over property by owner—May exclude persons from it.* The ownership of property implies absolute dominion over it, as against all other persons, subject, however, to the application of a well-known maxim of the law which requires that everyone shall use his own property so as not to injure another person. But this maxim is not infringed by any lawful use by the owner in places where a stranger may not rightfully come. The dominion which the owner of the property has the right to exercise implies that he may exclude or prevent all persons from coming upon his lands, and whoever does enter upon his lands without the consent of the owner, express or implied, is a trespasser and assumes the risk incident to such invasion, subject, however, to certain qualifications. The only difference between an express and implied consent consists in this, the one is expressed by words, the other by the surrounding circumstances and conduct of the parties implying that it would be unreasonable to hold to the contract.

Where there is no special relation alleged as understood between the plaintiff and defendant, the defendant is under the legal obligation or duty to control and manage these premises in such reasonable and prudent manner that he shall not wrongfully injure others rightfully upon said premises by any culpable acts or omissions. * * *

The owner of land is not liable for injury resulting from the unsafe or dangerous condition of his premises to persons who go upon them without invitation, express or implied.

The defendant would not be liable to the plaintiff for an injury resulting from the unsafe or dangerous condition of his premises, though adjacent to ——— street or a private way.

2. *Duty of traveler on highway.* The law imposes the duty of ordinary care upon all persons traveling on the highway, that degree of care commensurate with the hazards of the highway known to him, or that would be known to him, had he exercised reasonable care and prudence under the circumstances. But the plaintiff can not charge his errors and mistakes of judgment resulting in injury to him unless the defendant has, by his wrongful acts or misconduct, misled him into such errors or mistakes of judgment.

3. *Private road.* You are instructed also that protection can only be extended to the plaintiff against the hazard of the excavation upon the ground that he was upon a private road, having the right to presume from circumstances that the same was a highway upon which the public had a right to travel.

A person is not justified in making or maintaining excavations either in dangerous proximity to, or in a path where he permits other persons to traverse, or so near a public road that travelers in the ordinary aberrations or casualties of travel may stray or be driven over the line, and be injured by falling into such excavations.

Beyond this liability to the trespasser, voluntarily or involuntarily trespassing, does not go. The owner may make whatever excavations he chooses on his land without fencing them in, provided they are not on the line over which he permits travelers to pass, or so near a public road that leads into them, a traveler may unwittingly follow.

The question therefore is, was or was not said excavation located so near to said ——— street and said private road, in the manner it was kept, as to make it dangerous for a party passing along said ——— street in a usual and ordinary manner? If it was it was the duty of the defendant to provide such safeguards as would reasonably protect the party traveling thereon. Was or was not said private road so constructed, located and ordinarily used as to make it reasonably apparent that it was a public-traveled road, so as to reasonably induce the public to go thereon? If so, then the defendant was in duty bound

to provide such safeguards about said excavation as to make it reasonably safe for persons rightfully traveling in said street and private road.¹

¹ Voris, J., in *Schoner v. Schumacher Milling Co., Summit Co. Com. Pleas.* Affirmed by circuit and supreme court without report. Duty of owner when he invites others to come upon his premises to exercise ordinary care to have the premises reasonably safe. *Cooley on Torts*, 718. Individual adjoining owner to street who makes excavations in sidewalk commits a nuisance, and is liable to any person who, in the exercise of ordinary care, is injured therefrom. *Cooley on Torts*, 748 (626); *McIlvaine v. Wood*, 1 Handy, 166.

Sec. 2146. Duty of lot owners where excavation is made in sidewalk in front of premises by contractor.

If the defendant, for the purpose of constructing a block of buildings, removed, either by himself or by anybody else, if he caused to be removed this sidewalk and made the excavation and opened this hole into which the plaintiff fell, it is the duty of the defendant doing that by himself or by his agents, by his independent contractors, or in any other way, it is his enterprise; he is doing it for his benefit; it is his duty to use ordinary care to see that it is guarded and protected by the use of such ordinary care as men of ordinary prudence are accustomed to employ in that kind of enterprise. It is no defense for him to say that the work was being done by an independent contractor.¹

¹ From *Hawver v. Whalen*, 49 O. S. 69. This is apparently in conflict with the doctrine laid down in *Clark v. Fry*, 8 O. S. 358, but as the court say in this case (*Hawver v. Whalen*), the principle underlying the instruction does not necessarily conflict with the doctrine of *Clark v. Fry*, *supra*, provided that the doctrine of that case is to be strictly limited to the facts upon which it was announced. In *Clark v. Fry*, it is held that the rule *respondent superior* does not apply in case of an injury sustained by reason of negligence in the manner of conducting the execution of a job of work in building a house, where the house-builder by a contract with the owner of a lot, has taken upon himself the responsibility of the employment of his own hands, and the control and direction

of the work in conformity with the terms of the contract. If the necessary or probable effect of the performance of the work would be to injure third persons, or create a nuisance, then the defendant is not relieved from liability, because the work was done by a contractor over which it had no control in the mode and manner of doing it. *Railroad Co. v. Morey*, 47 O. S. 207. The making of an excavation across a public highway, which materially interferes with public travel, is an unlawful act, unless authorized by proper authority, and this because such excavation creates a nuisance.

If the defendant caused such an excavation to be made, it can not shield itself from liability if injury resulted to persons traveling upon such highway, because they had the excavations made by independent contractors over whom they had no control, unless it caused all reasonable precautions to be taken to prevent such injury. *Railroad Co. v. Morey*, *supra*.

Sec. 2147. Responsibility of lot owner for excavation made in premises in front of premises by independent contractor.

The rule of law is, that where the owner of a lot of land removes a section of the sidewalk along the public street in front thereof for the purpose of constructing a block of buildings and excavates a deep hole for the purpose of building vaults and areas under the sidewalk to connect with the basements of his buildings, and to be used in connection therewith, and while such vaults or areas are in process of construction the excavation is left with insufficient guard or covering to protect pedestrians who are lawfully there, and one of the latter falls into such excavation or area and is injured, it is no defense to an action by the injured party against the owners of the lot that they had contracted with an independent contractor to build the vault and areas, and that this independent contractor had omitted to cover, guard and protect the opening.

If these defendants took out and removed a section of that sidewalk to the depth of eight or nine feet for the purpose of building vaults and an area under it for their own benefit, to be used for their own building, it being of such a character as to cause an obstruction in the midst of a traveled public

thoroughfare or sidewalk; if they did that, and left it unguarded and unprotected, and if they failed to use reasonable care to guard and protect it, then it would not matter whether they had gone of themselves with their own shovels and their own hands to take out the dirt and make the excavation, or whether they employed another person to do it by the day, exercising supervision and control over him, or allotted the job out to another person as a wholly independent contract; it would be their work all the time; it is their excavation, done for them by somebody whom they employed to do it, and they would be responsible to a member of the public who was rightfully using this street for the purpose of public travel, if, without any fault upon his part, he fell into that excavation and was injured. I instruct you that the law is that it is the duty of these defendants, being the owners of the premises, and the lot belonging to them, and the work being done for their benefit exclusively, it is their duty to see that no dangerous pitfall is created in front of their premises in work of that kind. It will be important then for you to inquire whether this place was negligently treated by these defendants. In other words, did these defendants exercise that reasonable and ordinary care which men of ordinary prudence and caution are accustomed to exercise under such circumstances?¹

¹ From *Hawver v. Whalen*, 49 O. S. 69. Blandin, J.

Sec. 2148. Duty of traveler on highway—May presume that city has performed duty with reference to streets—Lights and guards in streets.

The law imposes the duty of ordinary care upon plaintiff while traveling upon the public streets of the city, and that degree of care commensurate with the hazards of the highway known to him, or that would be known to him had he exercised reasonable care and prudence under the circumstances. * * * And this care must be commensurate with the ordinary hazards of the highway and of such public streets, and such as were

incident to the construction of said street and road; and such other hazards as were known to him, or would be known to him had he exercised ordinary care and prudence. The plaintiff, acting in good faith in absence of knowledge to the contrary, is entitled to presume that the city would and did exercise reasonable care and prudence in performing its duty under the circumstances known to it, or that reasonably ought to have been known to it, in maintaining the street in reasonable condition and free from nuisance, so as to be reasonably safe for persons traveling upon the street.

While the defendant is not the insurer of the safety of the plaintiff while traveling upon the street in question, it is bound not to expose him to any hazards that reasonable care and prudence could prevent.

To enable you to say whether the defendant performed its duty in the premises, you should determine from the evidence whether proper lights, or guards, or other proper precautions were reasonably provided to warrant and protect persons traveling in the street of the dangers, if any, occasioned by the opening, and its relations to the sidewalk in question. If the defendant did not so guard the opened place and the sidewalk, it can not be said to have discharged its duties the law imposes upon it. The law imposes upon the city the duty of careful supervision, control, and maintenance of the public streets, and this duty extends to sidewalks of the city, which are essentially part of the public street of the city, and that it shall cause the same to be maintained and guarded in such a manner as not to constitute a nuisance.

The city can only discharge this duty by the exercise of all reasonable precautions to prevent injury to persons properly passing in the streets or on the sidewalks of the city from the injury.¹

¹ Voris, J., in *McDonald v. City of Akron*, Summit Co. Com. Pleas. No exception was taken to the charge.

For full discussion of the law involved in the above charge, see Dillon's *Mun. Corp.*, secs. 996, *et seq.*

Sec. 2149. Adjoining land owners—Rights and obligations of, to each other—To what extent lower proprietor may dig.

Every man has the right to use his property in any way he may see fit, so long as he does not interfere with the rights of his neighbor, and the extent to which a man may dig and excavate upon his own ground which adjoins his neighbor's land, may be determined according to the natural lay and situation of the two pieces of land. That is to say, if the lower of two hillside-owners desires to dig upon his land, he may dig to any depth which would not disturb the upper's land as it lay naturally, without any buildings, improvements or structures. If the digging of the lower one be such as not to disturb the land above, if it had no houses upon it, then he may dig to the same extent though a house be upon the land then, and if the house tumble down and fall by reason of such digging, the lower owner is not liable if he has used his land with regard to the upper land as nature made it, not as man made it; and this he has the right to do.¹

¹ Wright, J., in *Commissioners v. Halm*, Hamilton Com. Pleas.

CHAPTER CXXIV.

PARTNERSHIP.

SEC.

2150. What constitutes partnership.

2151. Partnership may be inferred from acts and conduct of parties.

2152. Burden to prove partnership.

2153. Whether there was general agency between partners.

2154. Partners in one transaction.

SEC.

2155. Ostensible partner.

2156. Right of surviving partner to wind up firm.

2157. Partnership may by mutual consent orally modify partnership contract — Evidenced by books.

Sec. 2150. What constitutes partnership.

“If the jury find that the defendants were jointly interested in the business, in which the work and labor charged in the petition were performed, sharing the profits and losses between them; that constitutes the defendants partners, and renders them liable as such for liabilities incurred on account of such business.”¹

To constitute a partnership there must be an agreement between the parties, that they will, from a certain date, share the profits and be responsible for debts and losses, and carry on the business for their mutual benefit; and there must be an entering upon, or conducting, or doing business under such agreement.²

The best-considered and least-objectionable test of partnership is that as a community of interest in the profits of a business or transaction as a principal or proprietor.³

But this test is valuable as a rule chiefly because it evinces a relation between the parties, where each may reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits is not regarded as a rule so uniform and unrelenting as to be unjustly applied. The true test of a partnership is left to be that of the relation of the parties as principal and agent, and if you find from the evidence that the relation of principal and agent existed between the defendants,

that the one acted in the business for and on behalf of the other, by such acts they have incurred a joint liability, and you may then find that a partnership existed between them.⁴

¹ *Warner v. Myrick*, 16 Minn. 94.

² *Thompson on Trials*, sec. 1133, taken from *Lucas v. Cole*, 57 Mo. 145.

³ *Par. on Part.* 71; *Coll. on Part.*, secs. 25, 44; *Story on Part.*, secs. 36, 38, 60; *Berthold v. Goldsmith*, 24 How. 536.

⁴ *Harvey v. Childs*, 28 O. S. 319, 321, 322. Sharing in profits, even though by way of compensation, makes one a partner. *Choteau v. Raitt*, 20 O. 132.

Sec. 2151. Partnership may be inferred from acts and conduct of parties.

There can be no partnership between parties unless there is an agreement between them constituting the relation between them into a partnership entity. The contract may be an express one in writing containing all the terms and conditions thereof. Or, like other contracts which the law does not require to be in writing, a contract of partnership may be proven by circumstantial evidence, that is, by showing acts and conduct of the parties from which the fact may be inferred that the parties have agreed to become partners. It must be made to appear from such acts and conduct of the parties that there was an agreement to share the profits as well as the losses of the business enterprise, both these elements being essential to constitute a partnership.¹

Hence if parties engage in a joint business enterprise, each putting in capital or labor or both, with an agreement to share the profits and losses as such, such relation constitutes in law a partnership, whatever the parties may call themselves.²

¹ *Bartlett v. Smith*, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912, A. 1195; *Haswell v. Standring*, Iowa, Ann. Cas. 1913, B. 1326.

² *Id.*

Sec. 2152. Burden to prove partnership.

In an action for money had and received, where the plaintiff alleges a partnership as an essential fact necessary to a recovery, the burden is on him to prove the existence of the partnership.¹

¹ *Cowart v. Fender*, 137 Ga. 586, Ann. Cas. 1913, A. 932.

Sec. 2153. Whether there was a general agency between partners.

“The jury are to determine from the evidence in the case when the partnership commenced. If it was a general partnership formed generally for the purpose of dealing in cattle, and each was authorized to act for the firm, then the act of one would be the act of all, for each acts as the agent of the other. But if the jury should find that it was limited in its scope and operation, and was to take effect at the time only of the election of each partner in every particular adventure or purchase, then the partnership could not be held until the property became the general property of all.”¹

¹ From *Valentine v. Hickle*, 39 O. S. 19.

“It must be shown by the plaintiff that the cattle were bought by a member of the firm as a partner, and therefore as the agent of the firm, which gave them an immediate vested interest at the time of the purchase, so that they would have called upon him for the profits and charged him with the losses in any sale that he might have individually made to others.” *Valentine v. Hickle, supra*.

Sec. 2154. Partners in one transaction.

“If the jury find that the defendants had any arrangement for shipping cattle, by which it was agreed that either of them might buy stock on his own responsibility; and upon its delivery for shipment at said place the others might take an interest in any stock so purchased and delivered, if upon examination of it they thought it suitable to ship or not purchased too high; or by which, if they purchased stock when all together, it was to be shipped on joint account; or if, after looking at or agreeing to take an interest in stock purchased by any one of them before delivered at said place, it was to be shipped on joint account and the parties to share in the profits and losses, such facts or agreements did not constitute them general partners, but only partners in each transaction.”¹

¹ From *Valentine v. Hickle*, 39 O. S. 19; *Bank v. Sawyer*, 38 O. S. 339; *Peterson v. Roach*, 32 O. S. 374.

Joint purchasers of land to be disposed of for joint profits are partners, 40 O. S. 233.

Sec. 2155. Ostensible partner.

You are instructed that a person, even though he has no interest in the business but who allows his name to be continued as an ostensible member of the firm, may be presumed to give credit to the business, and will to the extent that third persons are induced to trust the firm on the faith of his being a member, he will as to such third persons be estopped from denying that he is a member of the firm, and he will be held by the use of his name to have represented that he was one of the firm, and will be so held to be a member.¹ But to hold one who has so allowed his name to be connected with the firm of which he is not a member, it must appear that the creditor relied on such conduct, and dealt with the firm on the faith of such party being a member.²

¹ *Speer v. Bishop*, 24 O. S. 598; *Story on Part.*, sec. 64; *Jenkins v. Crane*, 54 Wis. 253.

² *Cook v. P. S. Co.*, 36 O. S. 135.

Sec. 2156. Right of surviving partner to wind up firm.

Gentlemen of the jury, it is the right and duty of the surviving partner to wind up a firm by the collection of assets, selling property on hand, paying debts, and striking balances. He can sue the estate of his deceased partner for any amount he finds due to him on such settlement.

The burden is on him to show to you that the balance he claims is the correct amount.

To determine this requires a knowledge of the agreement of division of profits or losses. You will have to determine this agreement.

The rules governing this question are that the partnership articles, if the firm continues longer than the time limited in the articles, are presumed to fix the terms of the continuation of the firm, just as much as those of the original firm.¹

¹ *Clement Bates, J., in Burgoyne, Admr., v. Moore*, 51 O. S. 626. Judgments affirmed.

Sec. 2157. Partners may by mutual consent orally modify partnership contract—Evidenced by books.

Written contracts may be changed by later oral contracts; and on this principle the partners may by mutual consent alter any part of the partnership articles. And this may be done by unanimous assent without spoken words. Hence the books of the firm showing any different arrangement of division of profits and losses, or in any way inconsistent with the articles, the books will control the articles. That is, the agreement of partnership may vary at different intervals. The articles settle what it was on the first day, and presumably it continues the same as then unless the books or proved agreement have changed the articles. The books of a firm are presumed to be the act of all the partners where all had access to them. Whether the plaintiff saw them is of no consequence, since he is not complaining of them. M. is bound by the books because they were made under his control or direction. After the death of M. the subsequent entries do not bind his estate. From that time on entries are the entries of Mr. A. alone, and are his private accounts, not binding upon M. except so far as proved by other testimony than themselves. And if at different periods the entries in the partnership books show a change in the proportion of the profits or losses which each partner was to have, such entries will determine each one's proportion."

"2. If in the several balancing of said books and rendering of statements copied therefrom, the bad, delinquent, and suspended accounts appear as a part of the assets of the firm, then the said defendant is not exempt from making good M.'s share of those accounts by reason of this statement and balancing of the books."

"3. If the agreement and the books show an understanding between the parties as to their rights in the business, the jury are to carry that agreement out, and statements by counsel as to the consequences upon either can not be considered by them, as no such questions are involved, nor is there any evidence upon the subject."¹

¹ Clement L. Bates, J., in *Burgoyne, Admr. v. Moore*, 51 O. S. 626.

CHAPTER CXXV.

PERJURY.

SEC.

2158. Defined—the statute.

2159. Materiality of statement.

2160. Willfully and corruptly —
Meaning of.

2161. Oath to be lawfully administered.

SEC.

2162. Statements believed to be true.

2163. More than one witness required as proof—Corroboration.

Sec. 2158. Defined—The statute.

Whoever, either verbally or in writing, on oath lawfully administered, willfully and corruptly states a falsehood as to any material matter, in a proceeding before any court, tribunal, or officer created by law, or in any matter in relation to which an oath is authorized by law is guilty of perjury.¹

¹ Code, sec. 12842.

Sec. 2159. Materiality of statement.

To constitute perjury the statute requires that the fact or facts sworn to if false shall be a material matter, and it is important, therefore, that you understand what is meant by material matter. The false swearing may be to the fact which is immediately in issue, or to any material circumstance which legitimately tends to prove or disprove such fact; or to any circumstance which has the effect to strengthen and corroborate the testimony upon the main fact, or which affects the credit of the witnesses giving testimony.¹ It is sufficient if it is material to any inquiry or question arising upon the trial, such as, if true, might properly influence the court in any matter affecting the rights of the parties. It must tend to directly or cir-

cumstantially affect the probability or improbability of any inquiry to be determined.²

¹ *Dilcher v. State*, 39 O. S. 133. A witness may be guilty of perjury in respect to false swearing concerning a mere circumstance, 3 Russell on Crimes, 121. False testimony which only serves to explain the knowledge of the witness. Bishop's Cr. Law, secs. 1034, 1037.

² *Com. v. Grant*, 116 Mass. 17; *Jacobs v. State*, 4 Am. Cr. 465; *Hawley's Cr. Law*, 247; *Clark's Cr. Law*, 334. Sufficient if material to a collateral inquiry: *State v. Shupe*, 16 Ia. 36.

Sec. 2160. Willfully and corruptly—Meaning of.

Before you can find the defendant guilty you must be satisfied beyond a reasonable doubt that he willfully and corruptly falsely swore to the matters charged. It must appear that the false oath, if it be false, was taken with some degree of deliberation, or that it was taken without any knowledge. By willfully and corruptly is meant that the defendant has intentionally sworn to a falsehood. If the jury find that the testimony was false, still you must be satisfied beyond a reasonable doubt that the defendant knew it to be false, or that he did not have any knowledge on the subject, or that he had good reason to believe it to be false.¹

If you find that the intention to swear falsely did not exist, or that he believed that he was telling the truth, and you find that such belief was an honest belief, and he had reasonable grounds for his belief, then you must acquit the defendant.²

Or if you find that the testimony was inadvertently given, or under a mistaken knowledge of the facts, the defendant is not guilty.³

¹ *Hawley's Cr. Law*, 249; *Clark's Cr. Law*, 332.

² 36 N. Y. 434; *Silner v. State*, 17 O. 365, 22 O. S. 477.

³ *Hawley's Cr. Law*, 249.

Sec. 2161. Oath to be lawfully administered.

Before you can find the defendant guilty of the crime of perjury you must be satisfied beyond a reasonable doubt that the oath was administered to him in a lawful manner, and by

some lawfully authorized officer, and that the oath must be one that is required by law. If the officer administering the oath is not authorized to administer the oath, the oath is not lawfully administered, and perjury can not be predicated thereon;¹ and if the officer administers an oath not warranted by law he acts not as an officer, and false swearing in such case would not be perjury.²

¹ *State v. Jackson*, 36 O. S. 281.

² *Willis v. Patterson*, Tapp. 324; *Beecher v. Anderson*, 45 Mich. 543; *People v. Garge*, 26 Mich. 30.

Sec. 2162. Statements believed to be true.

You are instructed that false swearing under an honest belief that statements are true is not perjury, still the jury are to determine from all the evidence in the case whether such honest belief existed; and if the jury believe from the evidence, beyond a reasonable doubt, that the defendant swore falsely as charged, and that he had no reasonable grounds for believing his statements to be true, and did not honestly and in good faith believe them to be true, then he is guilty of perjury.

If the jury find that the defendant testifies as stated in the indictment, and that his testimony was false, still if you have a reasonable doubt whether the defendant knowingly and willfully testified falsely in giving such testimony, the jury should find the defendant not guilty.¹

¹ *Nye, J.*, in *State v. Berk*, Summit Co. Com. Pleas. Affirmed by circuit and supreme courts.

Sec. 2163. More than one witness required as proof—Corroboration.

You are instructed that the fact that the defendant has sworn falsely can not be established by the testimony of one witness, that the law regards the oath of the defendant as the testimony of one credible witness in his favor, and sufficient to counter-vail the testimony of one witness swearing positively in contradiction of his oath, so that the testimony of the defendant and

the one witness against him would, if the jury regard the defendant as a credible witness, leave the evidence evenly balanced; and before the defendant can be convicted the state must furnish corroborative evidence of more than the one witness, L. D., or the testimony of one witness and other proofs corroborating such witness.

The corroborative evidence need not be of sufficient force to equal the positive testimony of another witness, or such as would require the jury to convict in a case in which a single witness is sufficient, but that it must be such as gives a preponderance of the evidence in favor of the state. In consideration of the evidence the jury should keep this rule in view in determining whether the false swearing has been proven, and if the state has failed to prove the false swearing beyond a reasonable doubt, the defendant should be acquitted.¹

¹ Approved in *Crusen v. State*, 10 Ohio, 259.

CHAPTER CXXVI.

POCKET-PICKING.

SEC.

2164. Instructions in charge of pocket-picking.

1. The indictment.
2. The statute.
3. Essential elements.
4. To steal and take, etc.
5. Intent—Proof.
6. Anything of value.

2165. Pocket-picking — Aiding and abetting.

SEC.

1. The charge.
2. The statute.
3. Conspiracy to commit crime of pocket-picking essential.
4. Proof of conspiracy—By circumstances.

2166. Possession of property recently stolen in crime of pocket-picking.

Sec. 2164. Instructions in charge of pocket-picking.

1. *The indictment.*
2. *The statute.*
3. *Essential elements.*
4. *To steal and take, etc.*
5. *Intent—Proof.*
6. *Anything of value.*

1. *The indictment.* The indictment in this case charges that the defendant did on or about the —— day of ——, 19—, in the county of Franklin, and state of Ohio, [read the indictment].

2. *The statute.* The jury is instructed concerning the law of this state as to the crime of “pocket-picking.” The statute provides that:

“Whoever otherwise than by force and violence, or by putting in fear, shall steal and take from the person of another *anything* of value, shall be deemed guilty of pocket-picking.”

3. *Essential elements.* The essential elements of the crime charged, the existence of which you must find beyond a reasonable doubt before you can find the defendant guilty of the crime of pocket-picking, are that on or about the date charged

in the indictment, without using any force and violence, and without in any manner putting in fear the person from whom the property is alleged to have been taken, the defendant did steal and take from such person of —— in this case, anything of value.

4. *To steal and take, etc.* By the terms *steal and take from the person of another, anything of value*, is meant that the defendant did feloniously steal and take the property charged by the indictment to have been taken from the person of —— with the intention of wrongfully depriving the said —— of the said property, and of converting the same to his, the defendant's, own use.

5. *Intent—Proof.* You are instructed that the intent to steal and take from the person of —— the property alleged to have been taken, does not have to be proved by direct evidence of an intent actually expressed by the defendant, but the intent to so steal and take the property may be presumed from a wrongful act intentionally done.

When an act forbidden by law is proved to have been knowingly done, no further proof is needed on the part of the state to obtain a conviction, as the law in such case *prima facie* presumes the criminal intent.

If you find, therefore, that the defendant did steal and take the said property from the person of —— as charged in the indictment, you are then warranted in finding that it was done by the defendant with the intent to steal.

6. *Anything of value.* By the term anything of value is meant money, goods and chattels.

Before you can find the defendant guilty of the crime of pocket-picking as charged, you must find that [she] [he] did steal and take from the person of ——, in the manner and form as charged, something of value, as that term has been explained to you.

Sec. 2165. Pocket-picking—Aiding and abetting.

1. *The charge.*
2. *The statute.*

3. *Conspiracy to commit crime of pocket-picking essential.*

4. *Proof of conspiracy.*

1. *The charge.* The defendant, ———, is charged in the indictment with aiding and abetting ——— in the commission of the crime of pocket-picking alleged to have been committed by her on ———, 19—.

2. *The statute.* The statute in Ohio provides that: "Whoever aids, abets, or procures another to commit any offense, may be prosecuted and punished as if he were the principal offender."

Before you can find the defendant guilty of the crime charged against him you must first find beyond a reasonable doubt that the said ——— did on or about the ——— day of ———, 19—, without the use of any force or violence and without putting the said ——— in fear, steal and take from the person of ——— something of value.

If you find that ——— did commit the crime of pocket-picking, then it will become your duty to consider the charge made against the defendant that he aided and abetted the said ——— in the commission of said crime of pocket-picking, or procured her to commit the same.

3. *Conspiracy to commit crime of pocket-picking essential.* Before you can find the defendant guilty of the crime of aiding and abetting in the commission of the crime of pocket-picking charged in the indictment, you must first find that he entered into a conspiracy with the said ——— to commit the crime of pocket-picking.

To render an accused person who simply gives aid and encouragement, but who does not take actual part in the criminal act, responsible and guilty, it is not necessary that he should have been strictly, actually, and immediately present when and where the act of picking the pocket of the said ——— by the said ———, and when she stole and took the property from him, the said ——— in the manner as hereinbefore explained to you. If the defendant was sufficiently near to give aid and encouragement and help to the said ———, that was enough. But

his mere presence at the commission of the crime, or so near that he could give aid and support in the commission thereof, was not alone sufficient to make him an aider and abettor.

To warrant you in finding that the defendant aided and abetted the commission of the crime of pocket-picking by the said ———, if you so find the fact to be, you must find that he purposely incited and encouraged the said ——— in the act of taking or stealing the property from the person of the said ———, if you find that she did so take it or that he did some overt act himself in connection therewith, with a view to that result, and in some way contributed thereto.

One who, not being actually present, keeps watch, or is so near to where the crime is committed as to be able to render assistance, or to contribute to the production of the act will, in law, be considered an aider and abettor.

I instruct you, however, gentlemen of the jury, that the crime of pocket-picking is complete when the person committing the same has, without force or violence, or without putting in fear the person from whom the property is stolen and taken, has actually so stolen and feloniously taken the property from such person, and that no one can be held as an aider and abettor of the crime of pocket-picking unless he is actually present and aids and abets by encouragement, or by some overt act, either before or at the time of the commission of the act.

You are instructed that a person can not be held responsible as an aider and abettor of the crime of pocket-picking for the mere rendition of aid and assistance to one who has committed the crime, *immediately thereafter*, unless such person so rendering such assistance to the one who committed the crime has previously entered into a conspiracy with the person so committing the crime, aiding and encouraging him to commit it and agreeing to aid and assist such person to successfully carry it out by getting away with the property after it has been feloniously taken from the person of another.

If you entertain a reasonable doubt whether the defendant did enter into a conspiracy with the said ———, by which he

aided and encouraged her to commit the crime, and whether he did agree to assist her in making her escape with the money after she had stolen or taken it from the person of another; and if the testimony does not tend to support the claim of a conspiracy, then I charge you that the mere fact that he did offer and render her some assistance after she had stolen and feloniously taken the money from the person of ———, if you find that fact to be, would not render the defendant guilty of aiding and abetting the said ——— as charged in the indictment.

If you find that no such previous conspiracy was entered into by the defendant and ———, and that the defendant had no knowledge that she intended to commit or had committed the crime of pocket-picking, if you find that she did commit the crime, but that the defendant did assist the said ——— in making her escape from the said ———, if you so find the fact to be, then I charge you that the law is that the defendant under such circumstances would not be liable as an aider and abettor thereto, and it would be your duty to acquit him.

There is no such crime in Ohio as a mere accessory after the fact to any crime; there is no liability under the statute of Ohio touching an aider and abettor for an act committed by a person in giving aid to one who has committed the crime of pocket-picking, who by trick or artifice feloniously takes property from the person of another.

And if you should find that the defendant without previous knowledge and conspiracy, merely aided her to escape from the said ———, then you must acquit the defendant.

On the other hand, if you are satisfied beyond a reasonable doubt, that the defendant and ——— did enter into a previous conspiracy to commit the crime of pocket-picking, and though the defendant was not present at the time the property was actually taken from the person, if such the fact you find to be, but that he was so near that he was able to render the said ——— assistance, and did so render her assistance, thus enabling her to escape and get away from the said ———, then your verdict should be one of conviction.

4. *Proof of conspiracy—By circumstances.* You are instructed, gentlemen, that the law does not require that a conspiracy shall be proved by direct testimony, but the same may be, and is generally, established by circumstantial evidence. It is not necessary, for the purpose of showing the existence of a conspiracy, that the state should prove that the defendant and ——— came together and actually agreed upon a common design or purpose. It is sufficient if such design and purpose is shown to you beyond a reasonable doubt by circumstantial evidence.

If, after a candid consideration of all the evidence as to the conduct and acts of ———, and if from declarations of the defendant and ———, you are satisfied beyond a reasonable doubt, that they were actually pursuing, in concert, the unlawful object stated in the indictment, whether by common or different means, but all leading to the unlawful result, then you are justified in finding the defendant guilty as charged, providing you find that the crime was committed as alleged, and that the defendant participated in it as alleged in the indictment.

You are enjoined to consider well and carefully the evidence in connection with the law as given you by the court. If you are of the opinion, beyond a reasonable doubt, that there was a conspiracy as charged herein, and you find all the other facts in accordance with these instructions, your duty is plain.

If, after a careful and impartial consideration of all the evidence, you can not feel that you have an abiding conviction of the truth of the existence of a conspiracy and of all the essential elements to warrant a conviction of guilt, you should render a verdict of acquittal.

¹ State v. W——, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 2166. Possession of property recently stolen in the crime of pocket-picking.

You are instructed that the unexplained possession of property which has been recently stolen, constitutes in law *prima*

facie evidence of larceny, and may be sufficient to warrant the jury in inferring that a person charged with the crime merely of larceny is guilty thereof.

In this case, gentlemen, the defendant stands charged with the crime of pocket-picking, that is, he is charged in the indictment with having taken the watch in question, without force and violence, from the person of one —— and without putting said —— in fear; that is, that he feloniously took the watch from the person of —— stealthily; the crime of pocket-picking, therefore includes the act and crime of larceny, with the act of stealthily taking property from the person of another.

If you find, therefore, that the said —— had his watch feloniously stolen from his person, by stealth, and if you further find that the defendant had possession of the watch soon after it was stolen, and if you are not satisfied beyond a reasonable doubt that he has not given a satisfactory explanation of his possession of the watch, if you find that he had possession of it; and if you believe beyond a reasonable doubt that his possession is not consistent with his innocence, then and in that event you are instructed, that while such possession does not raise a presumption of law that he is guilty of the crime of pocket-picking as charged in the indictment, yet I charge you that such possession not satisfactorily explained, is competent evidence to be considered by you, in connection with all the other facts and circumstances, as shown in the evidence as bearing upon the guilt or innocence of the defendant, and you may draw such inference therefrom as you deem warranted and proper.

If the possession of the watch by the defendant is satisfactorily explained and accounted for by him, then such fact of explanation should be considered by you along with all the other facts and circumstances disclosed by the evidence touching the guilt or innocence of the defendant.¹

¹ *Methard v. State*, 19 O. S. 363, 3 C. C. 551, 17 C. C. 486.

CHAPTER CXXVII.

RAILROADS—AS CARRIERS OF PASSENGERS.

SEC.

2167. Relation of carrier and passenger exists when.

2168. Carrier to exercise high degree of care.

2169. Passenger must observe care for his own safety.

2170. Not bound to carry passengers on freight train—Duty of company and passenger when so carried.

2171. Duty to furnish safe passage going to and from trains.

2172. When failure to carry passenger safely is shown, burden cast upon carrier.

2173. Ticket agents, duty and authority—Reliance upon by passenger.

2174. Duty of carrier as to putting off passenger at destination not stopping place for train—Authority of local ticket agent to bind company.

2175. Right to eject persons for failure to pay fare.

2176. Right to eject passengers for failure to pay fare—Liability if unnecessary force used—Drunken or boisterous passenger.

2177. Wrongful ejection of passenger through error of judgment.

2178. Measure of damages for wrongful ejection of passenger.

2179. Duty to provide safe platform.

2180. Duty of carrier to passenger boarding train.

SEC.

2181. Must protect passenger from violence.

2182. Not liable for assault not committed while in prosecution of master's business.

2183. Duty to stop trains at stations, and of passengers to get off.

2184. Duty to passenger falling from train.

2185. Duty as to stopping train for passengers to alight.

2186. Contributory negligence of passenger.

2187. Contributory negligence of passenger—Another form.

2188. Right of passenger to remain in waiting-room a reasonable time.

2189. Negligence of sleeping car employee—Railroad company presumed liable for injury—Burden of proof.

2190. Injury to conductor riding on train other than his own with consent of conductor in share.

2191. Liability for injury to passenger while assisting in caring for sick passenger—Whether plaintiff was directed or permitted to assist in caring for passenger—Duty of company towards sick passenger. [See additional headings in text.]

Sec. 2167. Relation of carrier and passenger exists, when.

The jury is instructed that the responsibility of the carrier towards the passenger begins when he presents himself for transportation; it is not necessary that the passenger shall have actually purchased a ticket to create the relationship; the person intending to become a passenger becomes one, and entitled to all the rights as such, when he approaches the place of reception for that purpose; and if you find from the evidence that the plaintiff approached the depot and informed the ticket agent of his intention and desire to become a passenger, and the station agent directed him about the trains, you may then find that the relation of passenger and carrier begins.¹

¹ *Allender v. R. R. Co.*, 37 Ia. 270; *Cooley on Torts*, 770 (644). Purchase of ticket or payment of fare not necessary to create relation. *Wood's Ry. Law*, p. 1205.

Sec. 2168. Carrier to exercise high degree of care.

The jury are instructed that railroads are public carriers, and that it is their duty as common carriers of passengers to use the highest degree of care towards their passengers; they must do all that human care, vigilance, and foresight can do under the circumstances, and in view of the character of the mode of conveyance adopted, reasonably to guard against accidents and consequential injuries, and if they neglect to do so, they are to be held strictly responsible for all consequences which flow from such neglect.¹

“The company is not an insurer of the absolute safety of the passengers as it is of goods which it undertakes to carry, but it is bound to exercise the highest degree of care to secure the safety of the passenger, and is responsible for the slightest neglect resulting in injury to the passenger; and this care applies to the safe and proper construction and equipment of the road, the employment of skillful and prudent operatives, and the faithful performance by them of their respective duties.”²

¹ *Tuller v. Talbot*, 23 Ill. 358; *Railroad v. Manson*, 30 O. S. 451.

² *Ex. R. R. Co. v. Dickerson*, 59 Ind. 321.

Sec. 2169. Passenger must observe care for his own safety.

The jury is instructed that the law makes it the duty of a passenger, while traveling on the train, to exercise ordinary care and caution to avoid the injuries incident to that mode of travel. In legal contemplation he expects to take, and does take upon himself, the hazards of such danger as may occur to him without any want of care or diligence on the part of the company and its operatives.¹

¹ From *Ohio & M. Ry. v. Dickerson*, 59 Ind. 321.

**Sec. 2170. Not bound to carry passengers on freight trains—
Duty of company and passenger when so
carried.**

A railroad company is under no legal obligation to transport passengers on its freight trains. The company confines its carriage of passengers to regular passenger trains, and its carriage of goods to its freight trains. But when the company assumes to carry passengers upon its freight trains, it is not bound to furnish to the passengers the same comforts and conveniences which are enjoyed on a regular passenger coach; but whether a railroad company undertakes to convey its passengers on a freight or passenger train, in a caboose or well-cushioned chairs, its duty is so to run and manage the train that passengers shall not, by its own carelessness, be killed or injured. On the other hand, he is presumed to know the manner in which such trains are ordinarily operated, and to assume any additional risk, aside from the negligence of the company, to which he may be exposed in consequence of his riding on a freight train.¹

¹ From *O. & M. R. R. Co. v. Dickerson*, 59 Ind. 322, 56 Ind. 511, 26 Ill. 373, 53 Ill. 397, 58 Me. 187, 39 N. Y. 227.

**Sec. 2171. Duty to furnish safe passage going to and from
trains.**

It was the duty of the defendant company, as a common carrier of passengers, to furnish a reasonably safe passage for its passengers going to and from its trains. And the law imposes an obligation on the part of the railroad company to take

reasonable care that a person holding the relation of passenger going to, or coming from, its trains shall, while thus on its premises, be exposed to no unnecessary danger, or one of which it is aware, and requires it to provide for such passengers a reasonably safe passage to and from said trains. If you find from the evidence that the plaintiff, at the time of the injury, was returning from a train of the defendant's cars, where she had lawfully ridden, she would be entitled to such protection from injury while on the railroad company's platform as men of ordinary care and prudence would be accustomed to give persons under like or similar circumstances.¹

¹ Nye, J., in *Clark v. N. Y. & O. R. R. Co.*, Medina county.

A common carrier is liable for any injury resulting from the slightest motion of his vehicle during the entrance or exit of a passenger. *Mulhado v. Brooklyn, etc., R. R. Co.*, 30 N. Y. 370; *Sherman & Redfield on Negligence*, sec. 508.

Sec. 2172. When failure to carry passenger safely is shown, burden cast upon carrier.

"It being admitted that the defendant is a carrier of passengers, that, on the occasion mentioned in the petition, the plaintiff was a passenger on defendant's train, having paid his fare, it was the duty of defendant to carry him safely to the point of his destination without injury; and when it is shown that the defendant failed to carry the plaintiff safely to the place of his destination, this failure puts the defendant, *prima facie*, in the wrong, and the burden of proof devolves upon it to show that the injury was the result of a pure accident, and that it could not have been prevented by the exercise of the utmost care and skill which prudent men are accustomed to employ under similar circumstances."¹

¹ From *Railroad Co. v. Mowery*, 36 O. S. 418.

Sec. 2173. Ticket agent's duty and authority—Reliance upon by passenger.

The jury is instructed that it is the duty of a ticket agent of a railroad, and it is within the scope of his authority, to give passengers correct information with regard to their tickets, and

to provide them, upon payment of the fare, with proper tickets. A passenger is justified and has the right to rely upon information given him by the ticket agent. Such passenger is not concerned with the management of the affairs of railroad companies, and is not presumed to know the rules and regulations adopted by the companies for the guidance of such agents; nor is a passenger presumed to know the limitations of the authority of the agents. On the contrary, a passenger has the right to rely upon the statements and assurances of a ticket agent as to the sufficiency of a ticket furnished him as evidence of his rights as a passenger, the carrier being responsible for the errors and omissions of an agent resulting in injury to the passenger.¹

So, therefore, etc.

¹ *Smith v. Railroad*, 88 S. C. 421, 70 S. E. 1057, 34 L. R. A. (N.S.) 708, Am. Ann. Cas. 1912, C. p. 730.

Sec. 2174. Duty of carrier as to putting off passenger at destination not stopping place for train—Authority of local ticket agent to bind company.

The jury is instructed that if a traveler, in the absence of an agreement or arrangement, or without acting upon information furnished by some authorized agent of the company, takes passage upon a train that is scheduled not to stop at the station to which he desires to go, he can not recover damages in an action if it fails to stop at such station, because, unless acting under an agreement or arrangement or upon information furnished by the company, the traveler must inform himself of the arrival and departure of trains and the places at which they will and will not stop.

The jury is instructed that an agent of a railroad company in charge of one of its passenger stations at which tickets for transportation of passengers are sold has authority on behalf of the company to agree with and furnish information to persons who desire to become passengers, that a train not scheduled to stop at a designated station will stop there for the purpose of permitting them to get on or off, the company, will be bound

by his representations, unless it is shown that the person with whom he made the agreement or to whom he gave the information knew that it was not within the power or authority of the agent to make the agreement or give the information, or unless the ticket on its face furnished advice sufficient to put a reasonably careful and prudent person upon notice that the information furnished or the agreement made by the agent was incorrect or in excess of his authority.¹

But if the agent of the railroad company has implied authority to act for it, and does make an agreement or representation in violation of its rules, or in disobedience of its orders, or fails or neglects to procure the necessary authority to do what he agreed or represented should be done, it is the fault of the agent and not the passenger, and the company as between the passenger and it must suffer the consequences of its agent's negligence or want of power.²

If the jury find, therefore, etc.

¹ L. & N. Ry. v. Scott, 141 Ky. 538, 133 S. W. 800, Am. Ann. Cas. 1912, C.

² *Id.* Penn. R. Co. v. Reynolds, 55 O. S. 370, 60 Am. St. 706.

Sec. 2175. Right to eject persons for failure to pay fare.

The jury is instructed that a common carrier has the undoubted right to eject and expel any persons from its cars who refuse to pay the legal fare. Necessarily that inherent power is invested in the conductor employed by the company and placed by it in charge of the train or car.¹

¹ Cinti. Northern Tr. v. Rosnagle, 84 O. S. 639, Am. Ann. Cas. 1912, C. 639.

Sec. 2176. Right to eject passenger for failure to pay fare— Liability if unnecessary force used—Drunken or boisterous passenger.

“The jury are instructed that if they believe from the testimony that the plaintiff did not pay, or offer to pay the conductor in charge of the train, his fare from C. to W., or place of destination, and refused to pay the same on being requested so to do, then the conductor was justified in putting plaintiff

off the train, and using only the necessary force to do so, at some regular station, or near some dwelling-house, as the conductor should elect. Yet if the jury further believe from the testimony that the conductor and others, agents and servants of the defendant, acting under orders from the conductor, forcibly put plaintiff off from the train, and in so doing used unnecessary force, and unnecessarily beat, kicked, and bruised plaintiff while he was so on the train, then the jury will find for the plaintiff and assess his damages at such sum as they believe from the evidence to be a just compensation for the injuries sustained. * * *¹

The defendant company had a right to prescribe rates for prepurchased tickets, and car rates when tickets were not purchased, for distances less than eight miles, and more than six miles, provided that neither of such rates exceeded the maximum rate allowed by law. Where a passenger enters the cars without having purchased a ticket, and when payment of the fare is demanded, is persistently refused, after giving such person a reasonable time to determine whether or not he will pay, such person has no right to remain on the train, or to claim the rights of a passenger, but may be treated as a trespasser. The conductor may lawfully eject such a person, provided he uses no unreasonable violence and does not expel him at a place where he would be exposed to serious injury or danger.²

It is not only the right, but the duty of a conductor to expel from a train a drunken, unruly, boisterous passenger, but when such a person endangers by his acts the lives of other passengers, it is the duty of the conductor to remove such passenger to protect others from violence and danger. This right must be reasonably exercised, and not so as to inflict wanton or unnecessary injury upon the offending passenger, nor so as to needlessly place him in circumstances of unusual peril.³

¹ From *Perkins v. R. R. Co.*, 55 Mo. 201, 208. Company may make rule requiring conductor to eject passenger for non-production of ticket, 26 O. S. 580, 29 O. S. 219, 56 N. Y. 296. For full discussion see *Kinhead's Plg.*, secs. 230, 231. Unreasonable violence must not be used, or he must not be ejected at a place of danger, 39 O. S. 453.

² *Railroad v. Skillman*, 39 O. S. 444.

³ *Railway v. Valleley*, 32 O. S. 345. Common carrier may refuse, without liability, to carry a person intoxicated. *Pittsburg, etc., R. R. Co. v. Vandyne*, 57 Ind. 576. Neither is he bound to carry anyone whose conduct is riotous or boisterous. Wood on Railroads, sec. 297.

Sec. 2177. Wrongful ejection of passenger through error of judgment.

The jury is instructed that if a common carrier wrongfully expels one who is entitled to the rights of a passenger, it is liable even though such expulsion is done through an error of judgment on the part of the conductor in charge of the train or car.

If a passenger tenders to the conductor a genuine coin of the United States, not so worn, defaced, or mutilated but that its mint marks are plainly discernible and not appreciably diminished in weight, and such tender is refused and the passenger ejected on refusal to pay in other money, such passenger is entitled to recover damages against the company, even though the conductor in good faith believed the coin to be counterfeit, or not a sufficient coin.¹

So if the jury find, etc.

¹ *Cinti. Northern Tr. Co. v. Rosnagle*, 84 O. S. 310, Am. Ann. Cas. 1912, C. p. 639, note.

Sec. 2178. Measure of damages for wrongful ejection of passenger.

The measure of damages to which plaintiff is entitled in case the jury find in his favor is compensatory in character; that is, such compensation as will be a reasonable redress for his injury. If it should appear from the evidence that the conductor used more force than was reasonably necessary to require the plaintiff to leave the train, or if the conduct, manner or language of the conductor was insulting, or abusive, or violent or threatening, or if his behavior manifested a wanton and reckless

disregard of the rights of the plaintiff, the latter will then be entitled to punitive damages, in addition to compensatory damages.¹

¹ *L. & N. R. R. Co. v. Scott*, 141 Ky. 538, 133 S. W. 800, Am. Ann. Cas. 1912, C. 547.

Sec. 2179. Duty to provide safe platform.

“It is the duty of the defendant to have its platform reasonably sufficient and safe in all respects, to be used by such persons as may have lawful occasion to use it. It is not necessary that it should be perfectly and absolutely safe; so great a degree of perfection is usually impracticable; but it must be reasonably safe and sufficient for all persons using it, who are themselves in the exercise of ordinary and reasonable care. If a barrier or guard is reasonably necessary to prevent persons, who are themselves in the exercise of ordinary and reasonable care, from falling from the platform to their injury, then a barrier should be placed upon it, or a guard should be placed to warn people of danger. Such lights as are necessary to render the use of the platform and the passage over it to the cars reasonably safe should be upon the platform, at the platform, at the time of the arrival of trains, and during the time the trains remain at the station.”¹

¹ *Ex Quaife v. R. R. Co.*, 48 Wis. 516.

Sec. 2180. Duty of carrier to passenger boarding train.

“It is the duty of a railroad company to use due care, not only in conveying its passengers upon their journey, but also in all preliminary matters, such as their reception into the car, and their accommodation while waiting for it; and, whether bound to render assistance in taking passengers aboard its cars or not, it is liable for the consequences of negligence in giving directions to passengers as to the mode of entering. Whether it was the duty of defendant’s agent to have assisted plaintiff in getting on the car is a question for you to consider and deter-

mine from the evidence in the case; and for this purpose it is proper for you to consider the train and the car, their distance from the platform and depot, the facility with which access could be had, the sex, age, and inexperience of the plaintiff, if these were known to defendant's agents, and all the facts and circumstances surrounding the case. When the carrier of passengers by railway does not receive passengers into the car at the platform erected for that purpose, and suffers or directs passengers to enter at out of the way places, it is its duty to use the utmost care in preventing accidents to passengers while so entering."¹

¹ From *Allender v. R. R. Co.*, 43 Ia. 277.

As to duty to aged and infirm persons, *Sher. & Red. Negligence*, sec. 508, 1 *How. Pr. (N.S.)* 67; *Wood on Railways*, sec. 1363. Company must stop car at platform and must furnish proper platform for passengers. *Sher. & Red. Negligence*, sec. 510.

Sec. 2181. Must protect passenger from violence.

The defendant company must carry its passengers safely and properly, and the duty to so carry its passengers safely extends still further. There rests on the carrier the obligation and duty to protect its passengers from violence; if such violence can not be prevented by the highest degree of care, the carrier can not then be held responsible; if the carrier has used the care which the law requires—that is, the highest—then it is not liable. A carrier is responsible for injuries willfully or carelessly inflicted upon passengers by its servants engaged to the performance of duties within the general scope of their employment, whether the particular act was or was not authorized by the master. The defendant is not an insurer of the safety of its passengers against all the risks of travel, but is bound to use the highest degree of care, and when that is done, that is all that the law may exact of them.¹

¹ See *Sherlock v. Alling*, 44 Ind. 184; *L. & C. R. Co. v. Kelly*, 92 Ind. 372. Some authorities seem to hold the carrier responsible for "violence and insults from whatsoever source arising." *Goddard v. R. R. Co.*, 57 Me. 202, 2 *Am. Rep.* 39.

Sec. 2182. Not liable for assault not committed while in the prosecution of master's business.

The jury is instructed that an employer is not liable for a willful injury done by an employee, though committed while in the master's business or while in the course of the employment, unless the employee's purpose was to serve his employer by his willful act. Where the employee is not acting within the course of his employment, the employer is not liable for his acts. A master holds out his agent as competent and fit to be trusted, and thereby, in effect warrants his fidelity and good conduct in all matters within the scope of his agency. But he does not and should not be held to warrant his servant's conduct in matters outside of the scope of that agency. In other words, he can not be held to be an insurer in matters not relating to the conduct of the master's business. Hence a master is not liable for an assault by his servant upon a third person, where the act is not committed in the prosecution of the master's business. So, when there is no original liability for the act of the servant, the master does not become liable merely because he thereafter retains the servant in his employ. A master is not therefore liable for an assault not committed in the master's business merely because he retains him in his employ.¹

¹ *Everingham v. Railroad*, 148 Iowa, 662, 127 N. W. 1009, Am. Ann. Cas. 1912, C. 848.

Sec. 2183. Duty of to stop its trains at stations, and of passengers to get off.

The jury is instructed that it is the duty of a railroad company to stop its train at the station a reasonable length of time to afford passengers for that station an opportunity to alight in safety; and for negligence in that respect, resulting in injury to such passenger, the company is liable.

It is equally the duty of the passenger, when he knows that the train has stopped at the station where he desires to alight, to do so with reasonable promptness. The length of time the train may stop may necessarily vary with the circumstances.

It will require more time for many passengers to get off or on a train than it will a few.

If the jury finds from the evidence that the train was stopped for a reasonable time to afford plaintiff an opportunity to alight in safety, the law is that those in charge of the train have the right to assume that plaintiff availed herself of the opportunity, and had performed her duty to alight with reasonable diligence; they were not, under such circumstances, required to ascertain whether plaintiff had alighted or not, and the company would not be guilty of negligence in starting the train after having allowed such reasonable time, unless there was something under the circumstances, and appearing in the evidence, to indicate to the agents in charge of the train or car, or cause them, in the exercise of reasonable diligence, to suspect that plaintiff had not gotten off, or was in the act of so doing, or was otherwise in a position of danger if the train should be started.¹

So, therefore, if the jury find, etc.

¹ *Railroad v. Lampman*, 18 Wyo. 106, 104 Pac. 533, Am. Ann. Cas. 1912, C. 788.

Sec. 2184. Duty to passenger falling from train.

If a company has notice that one of its passengers has fallen from the end of its train, the duty is incumbent upon it to exercise due care to prevent his death or injury from a following train, and its failure thus so to do renders it liable if death is caused by a following train running over such passenger while he lay unconscious or helpless on or near the track.¹

The case is narrowed, then, to the question whether two facts exist. First: was the death of this young man caused by a fall from the first train, or was it caused by the train which ran over his body? If it was caused by the first train, or if by the fall he was put in such a condition that his death immediately ensued, or must have ensued from the injury thus sustained, then the plaintiff can not recover. If you find that by the fall the death was not caused, and would not have ensued, but that the death was because of the train which followed, then

you will proceed to try the question, what notice the railroad company had of the actual condition of that young man upon the track. Notice to the brakeman would be notice to the company. It must be actual notice to the brakeman. He must have heard from someone, or must have seen that the young man would be likely to be in the condition in which, at this point, if you reach this point in the case, you must find that he actually was upon the track. You must determine as to the sufficiency of the notice from the circumstances in the case, as to where the notice was given, under what circumstances, the rapidity with which the train was proceeding, and all those circumstances which you may find to have been presented to the brakeman, if you do find that they were presented, and then judge if, from the facts thus presented, a brakeman of ordinary, average intelligence and prudence would conclude that K. was in a condition upon the track, or so near the track as that injury would necessarily follow from a following train.²

¹ From *Railroad Co. v. Kassen*, 49 O. S. 230.

² *Wm. H. Taft, J. in C., H & D. R. R. Co. v. Kassen*, 49 O. S. 230. Notice to brakeman in such case is notice to the company. *R. R. v. Ranney*, 37 Ohio St. 665, 30 Ohio St. 451. As to duty and care in such case, see *Kerwhacker v. R. R.*, 3 Ohio St. 172.

Sec. 2185. Duty as to stopping train for passengers to alight.

(The negligence charged is that plaintiff was not allowed proper and reasonable time and opportunity to alight from the train at F. station.)

If the train stopped at F. station at all, then it was the duty of the servants and agents of defendant to stop long enough to allow all passengers for that station to have a reasonable time and opportunity to alight from that train. If it did not stop at all, then plaintiff would have no right to try to get off a moving train

Now, that is a question of fact for you to determine from the evidence, whether the train stopped, and whether passengers were allowed a reasonable time and opportunity to alight from the train with safety. If the plaintiff has established that

fact by a preponderance of the evidence, and the evidence shows that the train did stop, and if plaintiff has established by a preponderance of the evidence that he was not allowed a reasonable time and opportunity to alight from that train, he has made out one branch of the case, and, in the absence of any other testimony, is entitled to recover. If you find that plaintiff was allowed a reasonable time and opportunity to alight safely from the train, of course that is the end of the case, and your verdict should be for the defendant without further inquiry.

But, if the evidence discloses that the train stopped and he was not allowed a reasonable time and opportunity to alight in safety, and he was thereby injured, then, in the absence of other testimony, he would be entitled to recover. If it be established, however, gentlemen, that the train did stop, it is for you to determine from the evidence what was a reasonable time and opportunity for him to safely alight.

If they stopped, but did not stop a sufficient length of time to allow plaintiff to alight from the train, and he was thereby injured, that would be negligence on their part which would make the company liable, unless the party injured was guilty of negligence on his part.¹

¹ From *C. H. V. & T. Ry. Co. v. Newell*, supreme court, No. 1313; 12478. Price, J.

A carrier must allow his passengers a reasonable time in which to get on and off the vehicle. *E. Bendorf v. Brooklyn, etc., R. R.*, 69 N. Y. 195; *Fairmount, etc., R. R. v. Stutter*, 54 Pa. St. 375.

Sec. 2186. Contributory negligence of passenger.

“Although the defendant did not exercise the degree of care required of it, yet, if the plaintiff was also in fault, and that fault contributed directly to produce the injury, he can not recover. His right to recover, however, is not affected by his having contributed to the injury, unless he was in fault in so doing.”¹

¹ From *Railroad Co. v. Mowery*, 36 O. S. 418.

Sec. 2187. Contributory negligence of passenger—Another form.

You will then inquire whether or not plaintiff was guilty of any want of care, or guilty of contributory negligence, whether he contributed to his own injury by want of care.

If the train stopped, they must have stopped a reasonable length of time, and if they did not stop at all, then he would have had no right to try to alight from the moving train, and if he did so, or attempted to do so, he would be guilty of contributory negligence, and it would preclude his recovering, and it makes no difference that he would be put to inconvenience by being carried past the station, because he was bound to exercise ordinary care and prudence, and it would not be ordinary care and prudence to attempt to get off from a moving train, so, if you find that he did so, he ought not to recover, because guilty of contributory negligence; and if he passed out from the coach and upon the platform intending to alight from the train, and the servants and agents of the company did not give sufficient time for him to alight from the train, and then he attempted to alight while it was moving, in that case he would be guilty of contributory negligence which would preclude his right of recovery. If he passed out of the coach and upon the platform, and the train passed on before he had time to alight, it was his duty, as soon as he reasonably could, to return to the coach, and if he failed to do so, and for that reason was thrown from the train while it was in motion, he would be guilty of contributory negligence; but if he passed out of the coach and upon the platform, and the train moved on before he had a reasonable opportunity to return to the coach, and he was thrown from the train, in that case he would not be guilty of contributory negligence, and could recover from the company.

It is essential to determine which side has the burden of proof as to contributory negligence. If the evidence introduced by him raises the presumption that he was guilty of want of care and prudence, then the burden of proof is thrown

upon him. If the evidence introduced by him does not raise such presumption, then the burden of proof is on the defendant. But, however it may be, if the evidence discloses that he was guilty of such want of care and prudence, that precludes his right of recovery. If you find negligence on the part of the servants and agents of the company, and that he was injured thereby, and that he was not guilty of such want of care and prudence on his part, it entitles him to recover.¹

¹ From *C. & H. V. & T. Ry. Co. v. Newell*, supreme court, No. 1313 (12-478). Price, J. If a passenger by the negligence of the company is carried beyond the station, he can recover for the inconvenience, loss of time, etc., but if he gets off while the train is moving, he does it at his own risk. *Jeffersonville R. R. Co. v. Hendricks*, 26 Ind. 228, 26 Ind. 459, 23 Pa. St. 147, 36 Ill. 467.

Sec. 2188. Right of passenger to remain in waiting room a reasonable time.

The jury is instructed that a railway company is not bound to furnish a lodging place for persons to lounge around or wait in for an unreasonable length of time before the arrival of a train which such person intends to take. If the evidence shows that the plaintiff could, by the exercise of reasonable means at her command, have prevented any damages to herself, and it appears that she carelessly failed to make a reasonable effort to avail herself of such means, and that this contributed in any manner as a proximate cause to her injuries, she can not recover.

A railroad company is only bound to open its depot and keep it warm for such time as is reasonably necessary to secure a traveler the right to be carried on its train. If, therefore, the evidence shows that a person goes to a depot and remains there for a longer time than is reasonably necessary to give such person the full enjoyment of the right to be carried upon the train, then the railroad company can not be held liable, even if they are made sick by remaining there.¹

¹ *Brckett v. Southern Ry.*, 88 So. Car. 447, 70 S. E. 1026, *Am. Ann. Cas.* 1912, C. 1212, and note.

Sec. 2189. Negligence of sleeping-car employee—Railroad company presumed liable for injury—burden of proof.

“The burden of proof is on the plaintiff to show that he was injured by the defendant’s negligence, either in not providing safe and suitable cars, or in not properly inspecting and taking care of them. A mere statement that a person was injured while riding on a railway, without any statement of the character, manner, or circumstances of the injury, does not raise a presumption of negligence on the part of the railway company. But if the character, manner, or circumstances of the injury are also stated, such statement may raise, on the one hand, a presumption of such negligence, or, on the other, a presumption that there was no such negligence. If the plaintiff was in fact injured while sitting in his proper place by the falling of the upper berth upon his head, while said berth ought to have remained in place above, such fact raises a presumption in this case of negligence, for which the defendant is liable. If you find that there was no defect in the road, or in the car, or the mechanism used, yet if, upon the evidence in this case, you find it reasonable to presume that the accident happened by reason of the upper berth not having been properly fastened in its place, or by reason of the persons having charge of the car having failed to observe that it had become loosened, if such insecure condition would have been observed by proper diligence, you have a right so to presume, and you would then find the defendant guilty of negligence. If, on the other hand, in such case you find it equally reasonable to presume that the fastening of the berth was loosened by some other person, not those in the employment of the defendant, and such insecure condition would not be observed by proper diligence on the part of the persons having charge of the car, you have the right so to presume, and in that case would find that the plaintiff had failed to make out a case of negligence against the defendant. The plaintiff is entitled to damages for injury traceable to the defendant’s fault, but not for injury caused by his own act.”¹

¹ From *Railroad Co. v. Walrath*, 38 O. S. 461.

Sec. 2190. Injury to conductor riding on train other than his own with consent of conductor in charge.

In *Railway Company against Robert Bycraft* (Supreme Court, unreported), the plaintiff was a conductor who boarded a train other than the one of which he was conductor, and, while riding thereon, was injured by a collision. The question at issue was whether he was a passenger on such train at the time of his injury, and whether he could recover for negligence of the conductor of such train.

J. R. Johnston, J., charged the jury as matter of law: That if you find that plaintiff was injured by reason of the negligence and want of care on the part of the conductor of train 37, and you also find that the plaintiff, at the time he received his injury, was upon that train with the consent, permission, and knowledge of the defendant, and with the consent, permission, and knowledge of the conductor of this train 37, but that at that time he was in the discharge of no duty incident to his employment, and was not engaged in discharging any of his duties as a conductor upon that road, or any duty upon that train, and was merely riding from A. to his home at B., with this consent, knowledge, and permission on the part of the defendant and of the conductor, that the negligence of the conductor in charge of train 37 would be the negligence of the defendant, and would not be the negligence of a co-employee, or fellow-servant, so as to defeat a recovery in this action, provided you find the plaintiff otherwise entitled to recover. If you have found the plaintiff to have been thus upon this train, then it became and was the duty of the defendant to exercise towards him ordinary care in the running and operating of that train, and this would be the degree of care and the degree only which was incumbent upon the defendant by reason of the relation which existed from the situation of the parties, and the relation they sustained toward each other at that time. If the defendant failed and neglected to exercise that degree of care towards the plaintiff, and for his safety, for such failure the defendant would be liable, provided

the plaintiff was in the exercise of proper care on his own part, and if this conductor of train 37 failed and neglected to exercise towards the plaintiff that degree of care, and by reason of this failure the plaintiff was injured, the defendant would be liable therefor.

“If you have found that the defendant was negligent in running and operating train 37, and find that it did not exercise towards the plaintiff ordinary care for his safety, and that, by reason of such failure, and as a direct and proximate result thereof, the plaintiff sustained his injuries, and have also found that at the time he received his injury he was upon this train, with the knowledge, permission, and consent of the defendant and said conductor, but was discharging none of the duties incident to his employment at that time, and discharging no duty required of him by the defendant on that train or otherwise, and was in the exercise of ordinary care himself, then the plaintiff would be entitled to recover, even though you may find at that time the relation of master and employee existed between the defendant and the plaintiff.”¹

¹ Johnston, J., in *Bycraft v. Ry. Co.* Judgment affirmed by supreme court. This case is distinguished from *Manville v. V. & T. R. R. Co.*, 11 O. S. 417, in that in the *Manville* case the conductor was in the discharge of a duty, being on the train going to his place of work. Judge Johnston's charge was approved by both circuit and supreme court. See as in point, *Packet Co. v. McCue*, 17 Wall. 508, where it was left to jury to say whether the employment had ceased.

The *Manville* case specially holds that the plaintiff must be in the employ at the time of the injury.

Sec. 2191. Liability for injury to passenger while assisting in caring for sick passenger—Whether plaintiff was directed or permitted to assist in caring for passenger—Duty of company towards sick passenger.

1. *Party assisting exposed to unknown danger.*
2. *Danger in passing from one car to another.*
3. *Ordinary care under circumstances of peculiar peril.*

4. *Lack of knowledge of relative positions of platform of cars.*
5. *Injury must result from direct act of negligence of railway officials.*
6. *If injury resulted from mere accident.*
7. *Notice of dangers of passing from one car to another by railway officials.*
8. *Passenger voluntarily assisting sick passenger.*
9. *Liability of company for directions of conductor as to care of sick passenger.*
10. *Duty of railway to sick passenger.*

1. *Party assisting exposed to unknown danger.* If the jury find from the evidence that the plaintiff, pursuant to the direction or request of the conductor of defendant's train, attempted to assist in the carrying of S. from the passenger coach to the caboose, and that, in so doing, he used reasonable care, and was injured by reason of exposure to a danger of which he was not aware, and of which the servants of defendant, if exercising only reasonable care, would have known of and either protected him from or gave him timely and adequate warning of; then in that case, defendant is liable for the injury resulting from exposure to such danger.

2. *Danger in passing from one car to another.* If you find that plaintiff was exposed to a danger in attempting to pass from the coach to the caboose, of which he did not know, and the servants of the defendant did know, or should have known, and it was such a danger as passengers, ordinarily, would not anticipate, then, and in that case, it became the duty of the defendant, by its servants, to give plaintiff timely and adequate warning of such danger; and failure so to do, if reasonably avoidable, was failure to use ordinary care, and for which defendant is liable.¹

3. *Ordinary care under circumstances of peculiar peril.* What I mean by ordinary care and prudence, as the words are used

¹ See Wood on Railroads, sec. 301; *Gee v. Met. R. R.*, 1 L. R. 8 Q. B. 161.

in this charge, is that degree of care and caution which persons of ordinary care and prudence are accustomed to use and employ under the same or similar circumstances.

The amount of care required will depend on the circumstances of each particular thing to be done, and will vary as the circumstances of each particular transaction may differ; it is to be such care as prudent persons are ordinarily accustomed to exercise under the peculiar circumstances of each case; if called into exercise under circumstances of peculiar peril, a greater amount of care is required than where the circumstances are less perilous, because prudent and careful persons, having in view the object to be attained, and the just rights of others, are, in such cases, accustomed to exercise more care than in cases less perilous; the amount of care is increased, but the standard is still the same; it is still nothing more than ordinary care under the circumstances of that particular case; the circumstances, then, are to be regarded in each case in determining whether ordinary care has been exercised or not.²

4. *Lack of knowledge of relative positions of platform of cars.* In determining whether plaintiff exercised or failed to exercise ordinary care in attempting to pass from the coach to the caboose, you will consider his knowledge or lack of knowledge of the relative positions and elevations of the platforms from and to which he so attempted to pass.

5. *Injury must result from direct act of negligence of railway officials.* To entitle the plaintiff to recover for a failure or neglect of defendant to exercise such reasonable or ordinary care as indicated, it must appear, from the evidence in the case, that the injury was caused and occasioned by and as a direct result from such negligence or want of attention on the part of defendant, and was not simply the result of an accident; and if the jury believe, from the evidence, that the injury resulted from an accident which could not have been seen and guarded against by the use and exercise of ordinary care and prudence

² As to degree of care, see *McIntyre v. N. Y. Central R. R. Co.*, 34 N. Y. 287.

on the part of defendant, then the plaintiff can not recover in this action.

6. *If injury resulted from mere accident.* But if the injury was the combined result of an accident and the defendant's negligence, or want of ordinary care, as aforesaid, and the accident would not have occurred but for such negligence or want of care by the defendant, and the danger could not have been foreseen or avoided by the exercise of ordinary care and prudence on the part of the plaintiff, the defendant, if guilty of such negligence or want of ordinary care, as aforesaid, would be liable for the injury to the plaintiff directly caused or occasioned thereby, if such did occur.

7. *Notice of dangers of passing from one car to another by railway officials.* If the railroad company, through its conductor or brakeman, gave timely notice or warning to the plaintiff of the danger of stepping from one platform to the other, and the plaintiff misunderstood the notice or warning, through no fault of the defendant, or failed to hear the notice or warning, and made the misstep and fell and was injured, there can be no recovery in this case against the defendant.

If the jury find, in this case, that S. heard the notice and warning from the conductor or brakeman to look out in stepping across from the coach to the caboose, and thereafter S. had time to make the step, as he understood the notice or warning, but, through misunderstanding of the notice, made a misstep and fell and was injured, then there can be no recovery in this action, and your verdict should be for the defendant.

8. *Passenger voluntarily assisting sick passenger.* If the jury find in this cause that the plaintiff, whilst upon said train, voluntarily and without the direction, knowledge, or request of the conductor of said train, left said passenger coach to aid and assist in carrying a sick or disabled passenger from said passenger coach across into said caboose, and whilst so doing, in stepping from the platform of the passenger coach to said caboose, he slipped or stepped short and fell, and received the injury complained of, in consequence of the distance between

said caboose and said passenger coach being more than he expected, or of the unequal height of the platforms, or owing to his view being hidden by the body of the man he was carrying, then there can be no recovery in this action, and your verdict should be for the defendant.

9. *Liability of company for directions of conductor as to care of sick passenger.* If the jury find from the evidence in this case that a passenger in one of said passenger coaches was taken sick or ill, or became disabled, through no fault or negligence or want of proper care on the part of the railway company, and, in order to find a place where said sick or disabled passenger could lie down, that he might be specially and properly attended to, the conductor of said train, upon inquiry of him if there was such a place, suggested or said that there was a caboose at the rear of said train, having seats lengthwise of the sides thereof, to which he might be taken if desired, and thereupon said plaintiff and others, friends of said sick or disabled passenger, proceeded to carry him to said caboose, and in so doing said plaintiff and others, before stepping from said passenger coach to said caboose, were warned to be careful in stepping across to the caboose platform, and thereafter the plaintiff, in stepping across, stepped short or slipped and fell between the platforms of the caboose and the passenger coach and was injured, then the plaintiff can not recover in this action, and your verdict should be for the defendant.

10. *Duty of railway to sick passenger.* The railroad company, having provided comfortable, safe, and fit passenger coaches for the plaintiff, with all the usual, proper, and ordinary attachments and conveniences for public travel, was not obligated or bound to provide, in addition thereto, a car specially designed for the purpose of carrying sick or disabled passengers thereto or therein; and if you find that the plaintiff voluntarily aided and assisted in the carriage of a sick or disabled fellow-passenger from one of said passenger coaches to said caboose, even though with the permission of the conductor of said train, he thereupon took upon himself and assumed all the usual and ordinary risks,

dangers, and perils of such service arising from the differences between the height of the platforms of said coach and said caboose, and the space between the same; and if, in the doing and performance of said service on his part, he was injured, through no willful act or misconduct on the part of said defendant or its employees, then there can be no recovery in this action by the plaintiff.

If the jury find from the evidence in this case that the conductor of said passenger train permitted or consented that said sick man might be removed from said passenger coach to said caboose, he did not thereby direct such removal, nor direct nor invite the plaintiff to help or assist in the removal of said sick man from said passenger coach to said caboose; and if the plaintiff volunteered to, or was requested by said sick man or his friends, to help carry said sick man from said passenger coach to said caboose, he thereby assumed all the usual and ordinary risks and perils attendant upon such service, and the defendant could not be held liable for any injury received by plaintiff, which was one of the usual and ordinary risks and perils of such service.

If the jury find from the evidence in this case that the injury to S. was accidental and not from any want of proper care and precaution, under the circumstances, on the part of himself or the railroad company, then there can be no recovery in this action, and your verdict should be for the defendant.³

³ Snook, J., in *Railway Company v. Salzman*, 52 O. S. 558. "A railway company is under obligation to give such care to a passenger who becomes sick on its train as is fairly practicable with the facilities at hand, without thereby unduly delaying its trains, or unreasonably interfering with the safety and comfort of its other passengers." As to degree of care in, see *McIntyre v. N. Y. Central R. R. Co.*, 34 N. Y. 287. As to duty to care for sick passengers, see *A. T. & S. R. R. Co. v. Weber*, 33 Kan. 543; *Connolly v. Crescent City R. R. Co.*, 41 La. Ann. 57.

CHAPTER CXXVIII.

RAILROAD CROSSINGS—INJURIES AT.

SEC.

2192. Relative rights and duties of company and public to use crossing.

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2193. Duty of (deceased) to use senses on approaching crossing—Another form.

2194. The giving of signals when approaching crossings.

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2202. Train has right of way—Duty of one about to drive across crossing to stop when train in close proximity.

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2212. Injury to child climbing over train stopping on crossing — Negligence under such circumstances.

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2215. Presumption that every person exercises care for his own safety when in danger—Burden of proof on defendant to prove decedent did not look and listen.

2216. Defendant liable though statutory signals given—When other acts of negligence charged.

Sec. 2192. Relative rights and duties of company and public to use crossing.

The right of the railroad company to enjoy the use of its railroad at the crossing of the public highway, and the right of the traveling public to use the highway, are co-ordinate and equal; reasonable care and prudence must be exercised by each in the use of the same; each must so use his own right to cross that he shall not unreasonably interfere with the rights of others to pass over, having in view the nature and necessities of the method of locomotion, and power of control over the locomotion peculiar to each, so that, while the operators of the railroad are to use care, considering the nature of their machinery, the speed with which it is necessary to run a train, the effect of a collision by the train with an object on the crossing, and all other elements of danger entering into it, if there are any, that, under the circumstances, a man of ordinary prudence would exercise; so is he who travels upon the highway to use ordinary care.

Considering the means by which he is traveling, it will be observed that the man on foot, or traveling with a horse and buggy, can much easier control his movements than can the servants of the railway control the movements of the train, so the rule is that each one, with reference to their particular mode of traveling, that they should exercise the care that men of ordinary care and prudence would use under the same or similar circumstances. The defendant had the right to run the train at the time and place of this collision at any speed consistent

with the safety which was necessary in the conduct of its business in the usual and ordinary manner, taking into consideration, however, all the circumstances surrounding that crossing affecting the traveling public and having a due regard for the safety of the public using the crossing.¹

¹ Gillmer, J., in *Flemming v. Penn. Co., Trumbull Co. Com. Pleas.*

If one approaching a crossing fails to look out for approaching trains, he is *prima facie* guilty of negligence, 24 O. S. 670, 677, 28 O. S. 340.

Sec. 2192a. Same, continued—Both must use faculties to discover danger.

Plaintiff and defendant in this case had co-ordinate and equal right to the use of crossing of the highway and the railroad, and they were each held to the exercise of reasonable care and prudence in the use of the crossing, so as not to interfere unnecessarily with the other. Such reasonable prudence would require both plaintiff and defendant's employees, if in the full enjoyment of their faculties of seeing and hearing, before attempting to pass over a known railroad crossing, to make use of such faculties for the purpose of discovering and avoiding danger, and the failure to do so without reasonable excuse is negligence.¹

¹ J. H. Day, J., in *I. E. & W. R. R. Co. v. Stadler*, supreme court, unreported case. See important case and note, *Paul v. Railway*, Ann. Cas. 1912, B. 1132, 231 Pa. St. 338.

Sec. 2193. Duty (of deceased) to use senses on approaching crossing—Another form.

“The deceased was bound to use the same care in protecting himself that the defendant company was bound to use in seeing that no person came to injury by the management of its cars and engines. That is, he was bound to use such care and prudence as a reasonable, prudent man would use in protecting himself against any injury. It was his duty to use his senses, in approaching the railway track, to discover whether or not there was an approaching train or locomotive which might

injure him, to make such reasonable use of his eyes and other senses as a reasonable and prudent man would make, and if, by the use of them, he could have avoided the danger, then he can not recover from the company. But if he exercised such care as a reasonable and prudent man would exercise, and if the defendant was guilty of neglect in the running of the engine, and the deceased was killed by reason of that, then the company is responsible.”¹

¹ From *Railway Company v. Schneider*, 45 O. S. 678. “It was the duty of the deceased in approaching the railroad crossing, to look for the locomotive before attempting to cross; and if his failure contributed to the accident, the plaintiff can not recover, even though the defendant’s negligence contributed to the injury.”

“Even though the fireman and engineer were guilty of neglect contributing to the injury, yet that did not absolve the deceased from exercising the precaution of looking and listening for the approach of trains at such point on the street as would enable him to discover the approaching train or locomotive; or from approaching the crossing at such gait as would enable him to control his horses promptly.” From *Railroad Co. v. Schneider*, 45 O. S. 678.

Sec. 2194. The giving of signals when approaching crossing.

The statute requires that a railroad company shall attach to each locomotive passing upon its road, a bell and whistle, and when an engine is in motion and is approaching a turnpike, highway or town road crossing or private crossing where the view of such crossing is obstructed by embankment, trees, curve or other obstruction to view, upon the same line therewith, and in like manner where the road crosses any other traveled place, by bridge or otherwise, the engineer or person in charge thereof, shall sound such whistle at a distance of at least eighty and not further than one hundred rods from such crossing, and ring such bell continuously until the engine passes the crossing.¹

¹ Code, sec. 8853.

Sec. 2195. Signals for the protection of persons about to cross the track.

The statute is designed for the benefit and protection only of persons who are about to pass over a grade or other crossing

as therein provided, for it provides that the whistle is to be sounded before reaching the crossing, and the bell is to be continuously rung until the crossing is passed. The signals are not required at any other time.¹

¹ *Railway v. Workman*, 66 O. S. 509, 542; *Railway v. Depew*, 40 O. S. 121, 127-129.

Sec. 2196. Omission to ring bell and sound whistle.

The law requires that every railroad company shall have attached to each locomotive engine passing upon its road a bell of the ordinary size in use on such engines and a steam whistle; and the engineer or person in charge of the engine in motion, and approaching a public highway or town-road crossing, upon the same level therewith, shall sound such whistle at a distance of at least eighty, and not further than one hundred, rods from the place of such crossing, and ring such bell continuously until the engine passes such road crossing; and such company employing such engineer or person in charge of the engine shall be liable in damages to any person injured, in person or property, by such neglect or act of such engineer or person.

In regard to that statute the jury are instructed that the omission to ring the bell or sound the whistle at public crossings is not sufficient grounds to authorize a recovery, if the person injured, notwithstanding such omission, might, by the exercise of ordinary care, have avoided the accident; but if the person injured by reason of such omission to ring the bell or sound the whistle could not, by the exercise of ordinary care, have avoided the accident, he would be entitled to recover damages under that statute because of such omission.

Therefore, if the jury find from the evidence that plaintiff's intestate was injured by the negligent omission to ring the bell or sound the whistle upon defendant's locomotive, and that, by the exercise of ordinary care, he could not have avoided the injury, then plaintiff will be entitled to recover damages because of such negligence and injury inflicted thereby.

If the jury believe from the evidence that the engineer sounded the whistle from a point more than one hundred rods to a point nearer than eighty rods from the crossing where the accident occurred, such sounding of the whistle was a substantial compliance with the requirements of the law in that behalf.¹

¹ Douthitt, J., in *P. C. C. & St. L. Ry. v. Adams*, S. C. 3671. Judgments affirmed. Harrison county. The failure to give signals must have been the proximate cause of the accident before recovery can be had. *Penn. Co. v. Rathgeb*, 32 O. S. 72.

Sec. 2197. Relative duties of plaintiff and defendant—Plaintiff may drive on when train standing still.

The same duty was upon him in approaching a known railroad crossing as upon defendant, and he must use his faculties of seeing and hearing to detect and avoid danger. He must look and listen to ascertain if there is danger, and to avoid it. If he fails to do this, he is not in the exercise of ordinary care, but is negligent. If plaintiff looked and listened in this case, and saw the train standing still, with no evidence of activity or intention to move back, and no signal was discovered or heard of an intention to move back, he would be at liberty to drive onto and across the railroad, and would not be subject to the charge of negligence. If, however, he omitted these things, and without exercising ordinary care, and without care, drove onto the crossing in the presence of a moving train, or a train that had signaled and given notice of its purpose to move across the crossing, in such case the plaintiff may not recover.¹

¹ *J. H. Day, J.*, in *L. E. & W. R. R. Co. v. Stadler*, supreme court, unreported.

Sec. 2198. Failure to look and listen, negligence—Duty of defendant to give warning—View of plaintiff.

It is a duty of a person approaching a known railroad crossing to look and listen for an approaching train and to make use of his senses to ascertain if there is a train in the vicinity, and if, being in full possession of his faculties, he fails to take

such precautions without reasonable excuse therefor, when a prudent man, exercising his senses, would have discovered a train in close proximity, and such failure contributes to produce injury, he is guilty of negligence, and there can be no recovery.¹ It is the duty also of the defendant company by proper signals, and in a manner that would ordinarily communicate to the plaintiff approaching the crossing, that the defendant's train was approaching the crossing, but that its notice must be given so that the plaintiff could protect himself from injury.

If you find from the evidence that there was a place on the east side of ——— street where the train could be seen as it approached the crossing, and further find that the train could have been seen by the plaintiff from that space as he passed, and he failed to look, without a reasonable excuse therefor, he was guilty of negligence, and if such negligence contributed to produce the injury, then he could not recover.

It is because railroad crossings are dangerous that it is the duty of persons approaching them, and about to cross, to be careful. Any circumstances or obstruction which increases the danger of crossing increases the duty of vigilance to avoid the injury.

(a) *Must use senses, slacken speed or stop.*

It is the duty of a person approaching the crossing in a buggy to assure himself, if he can by the use of his senses of sight and hearing, that no cars are in dangerous proximity, or, if necessary in the exercise of ordinary care to make such observations, he would be required to reduce the rate of speed, or even to stop his conveyance so as to ascertain whether or not he could cross the track in safety; but in this case the law does not require a vain thing, and if there were buildings and obstructions which would have prevented the plaintiff from seeing the approaching train if he had turned his eyes in that direction, that he was not bound to look at such point, and failure to do so would not be negligence.²

¹ C. C. C. & I. Ry. v. Elliott, 28 O. S. 340; Railway v. Geiger, 8 O. C. C. 41.

² Gillmer, J., in *Flemming v. Pa. Co., Trumbull Co. Com. Pleas.*

Where buildings and obstructions obstruct view, for degree of care in, see *Wood on Railroads*, sec. 323; *Dimmick v. Chicago, etc., R. R. Co.*, 80 Ill. 338.

Sec. 2199. Duty to provide safeguards if structures render crossing dangerous—Question for the jury—Negligence of pedestrian.

If you find from the evidence that the railroad company, by reason of the speed it ran its trains across ——— street, its number of tracks, or having cars standing on the tracks near said crossing, or the existence of buildings or other structures at or near said crossing, rendering the use of ——— street dangerous to the public, you are instructed that the company was under obligation to employ reasonable care and prudence in providing safeguards for the protection of persons lawfully passing along said street and over said railroad tracks, and commensurate with the dangers of the locality so created by the company, to persons exercising their rights to pass over and along said highway in a reasonable manner. It is left for you to say from the evidence, under all the circumstances, whether a flagman ought to have been employed by the company, and whether it would be negligence on the part of the defendants not to have done so at the time of the injury; and if the defendant was guilty of negligence in these respects, and the decedent was not in fault, and sustained said injury therefrom, the plaintiff would be entitled to compensation therefor, if in other respects, you find that he is entitled to recover under the instructions given you.

If the decedent knew that a flagman was employed by the company at the crossing, and had good reason to believe, and in good faith believed, that one was so employed at the time of the injury, and you further find that it was the duty of the company so to employ a flagman, the decedent might presume, in the absence of knowledge to the contrary, that he was properly discharging his duties, and it was not negligence on her

part to act on the presumption that she was not exposed to danger, which could arise only from the disregard by the flagman of his duty;¹ and if the flagman was then absent from his place of duty, or was not giving any signal or warning when she attempted to pass over the crossing, she might presume that no train was approaching which would make it dangerous for her to attempt to pass over the crossing, in the absence of other knowledge to the contrary.²

¹ Schneider case, 45 O. S. 678.

² Voris, J., in Gaston, Admr., v. Lake Shore R. R. Co., Lorain Co. Com. Pleas.

Flagman and Gatemen.—In the absence of statute, the omission to maintain flagman may be considered as part of *res gestae* with other facts as bearing upon prudence or negligence of company, 78 N. Y. 518, 66 Mich. 150, 74 Wis. 240, 74 Wis. 514, 101 Mass. 201; Beach Contrib. Neg., p. 247; Patterson Ry. Acc. Law, 163. At an exceptionally dangerous crossing, a company is bound to exercise care proportioned to the increased danger, and should maintain flagman, gates or gatemen. Ry. Co. v. Schneider, 45 O. S. 678. A traveler approaching the crossing may presume that the gatemen will properly do their duty. *Id.* There is no rule of law requiring a railroad company to erect gates, or keep flagman at crossings outside of a city or village. L. S. & M. S. Ry. v. Gaffney, 2 Oh. Dec. 212 (C. C.).

If a railroad company voluntarily establishes a gate at a crossing, there is an implied assurance that the tracks may be safely crossed if the gates are open. Jaggard on Torts, 881.

Sec. 2200. Duty of driver of vehicle approaching crossing when view unobstructed, and where obstructed—Duty when flagman gives signals—Must be free from negligence.

“The common precaution is to look both ways and listen. Perhaps where the view of the track is unobstructed and sufficiently wide, it satisfies the rule simply to look, otherwise the common law is that one should also listen. Where the view is obstructed, the caution must consist mainly in listening, it may be a duty to produce quiet by stopping. If the railroad company employ a flagman, gate or other device to warn people

of approaching danger, a traveler is not negligent who, instead of looking and listening, follows the signals, unless he reasonably knew aside from the signals that danger was actually imminent. But, on the other hand, a traveler who relies upon the signals rather than upon his own faculties is negligent if he disregarded the signals.

“The matter may be summarized thus: A railroad track is commonly a place of danger. He who undertakes to cross, to be free from negligence, must take such precaution to ascertain the imminence of danger as an ordinarily prudent man would take under like circumstances. And if you believe from the evidence that the driver might, by the exercise of ordinary care and caution, have become aware of the danger and have avoided it, that he omitted to exercise such care and caution, and that his omission to do so directly contributed to the injury, then he was guilty of negligence.¹

¹ *Leisor v. C. H. & D. R. Co.* Hamilton county. Wright, J. See *R. R. Co. v. Schneider*, 45 O. S. 678.

Sec. 2201. Injury to pedestrian crossing track—Duty when there is temporary obstruction—Standing on track and failing to look for approaching train prima facie negligence.

If a passing train on another track, or escaping steam, or any other temporary cause obstructed or obscured her view or hearing, then the court says to you that it was her duty, before attempting to cross, to wait until such temporary cause had passed away, and if she attempted to cross without thus waiting, she did so at her own risk, and if injured while thus crossing, she can not recover, if you find that, by waiting until such temporary cause had passed away, she could have crossed in safety.

The necessity or importance of her being at the factory immediately or promptly would be no excuse for her not waiting until she could cross in safety, or justify her in taking any

risks; neither would absent-mindedness, thoughtlessness, forgetfulness, or inattention.

If you find that plaintiff failed to look east for the train, that is not merely evidence of negligence from which you may or may not infer it, but it is, in and of itself, such negligence as prevents her from recovering, if, by thus looking, she could have seen the approaching train in time to have avoided the injury. And it was equally her duty to listen as well as look, and to do both attentively and carefully until across the track. And it is the duty of every person of mature years and sound mind, about to cross a railroad track, not only to look and listen, but to exercise all their other senses and means of knowing to ascertain if a train is approaching, and if they fail to do so without a reasonable excuse therefor, and are thereby injured while crossing, they can not recover.

If an adult person in full possession of her faculties goes upon a railroad track and voluntarily stops or stands thereon, not being an employe of the railroad company, and omits to watch for the approaching trains, she is, *prima facie*, guilty of such negligence as will prevent her recovering for injuries while so on the track; and before she can recover, she must show that it was not reasonably practicable to keep such lookout, or that which would ordinarily induce a person of common prudence and circumspection to omit such precaution.

If the plaintiff failed to look and listen, she was guilty of such negligence as will prevent her recovering, if, by proper and prudent looking and listening, she could have ascertained and avoided the injury, and also, if she looked and listened and did not see or hear the train when, by the exercise of ordinary care and attention, she might have done so and escaped injury, then in law she looked and listened carelessly and negligently, and is equally culpable, and in either case she was guilty of such negligence as will prevent her recovering a verdict, if you find that her negligence or failure aforesaid contributed to her injury, in whole or in part, unless you find that it was prudent and proper for her, under the circumstances,

to omit looking and listening before going on the track, and also while standing upon it, if she did.¹

¹ Gillmer, J., in *Huron v. N. Y. L. E. & W. R. R. Co.*, Portage Co. Com. Pleas.

As to necessity of flagman, see Code, sec. 588.

Sec. 2202. Train has right of way—Duty of one about to drive across crossing to stop when train in close proximity.

The jury is instructed that as between a person who is about to cross over a railroad at a crossing, and a train of cars approaching such crossing, the train has the right of way. This is so because the person can stop within a few feet, while the train can not. It is therefore the duty of the person so approaching the crossing to stop and let the train pass before attempting to cross, provided it is apparent to an ordinarily prudent person that both the approaching train and the person are in such close proximity to the crossing as to make it reasonably apparent to an ordinarily prudent person that such train is so close at hand as to render the crossing by the person dangerous under the circumstances.

To rush ahead and attempt to pass under such circumstances knowing the train is of such close proximity to the crossing as to render such act dangerous would constitute negligence.¹

¹ *Railroad v. Kistler*, 66 O. S. 326, 336.

Sec. 2203. Duty of driver of vehicle to look just before crossing track.

To drive upon a crossing without first looking for passing trains is negligence. It is the duty of one about to cross at a railroad crossing to look for the passage of trains just before going upon the crossing, or so near thereto as will enable him to get across in safety at the speed he is going before a train within the range of his view of the track, going at the usual speed of fast trains, would reach the crossing. It is the duty of such person to so look before going upon the track, even

though such person had before approaching closely to the track, that is, though there was a looking farther away when no train was seen approaching. Such person is bound to take into account the fact that a train at the usual speed will go quite a distance, while a team on a walk or trot will go a much shorter distance. The care to be observed by the traveler in such case must correspond with the danger, and is to be determined by the jury under the facts and circumstances disclosed by the evidence.¹

¹ Railroad v. Kistler, 66 O. S. 326, 336.

Sec. 2204. Duty of engineer in approaching crossings.

The jury is instructed that it is the duty of an engineer on a train to keep a lookout on the track ahead of him. He is not expected or required to see anything on the sides of the right of way farther than his eye may take in objects within the range of vision while looking ahead along the track, because his paramount duty is to watch over the safety of the persons in his charge, which obligation is most effectually performed by keeping a strict lookout ahead along the track, so as to see any obstruction at the earliest moment, and to be prepared to avert danger to the train. If, however, while so looking ahead his eye takes in a person approaching the track at a crossing, he is then bound to use ordinary care to prevent injury, his first care however being for the safety of his passengers and property on board for transportation.

The engineer has the right to presume that a person so approaching the crossing will keep away from the track until the train passes, but when it becomes apparent to him that the person can not or will not keep away from the track, then it is incumbent on such engineer to do all that he reasonably can to prevent injury.

Whether or not the engineer could or did see the person approaching the crossing is for the jury to determine. Of course whatever he would or should see in the reasonable discharge of

his duty, he is chargeable with having seen. But he is not required to neglect his duties on the train to look outside of the right of way for approaching persons, not within the range of his vision while looking ahead along the track. There can be no recovery by plaintiff, unless it appears from the evidence that the engineer after he saw —, and realized his danger, had time to slow down the train or to stop it so as to prevent the injury.¹

¹ Railroad v. Kistler, 66 O. S. 326.

Sec. 2205. Injury resulting from concurrent miscalculation of engineer and driver of vehicle—No recovery.

If it appears from the evidence, that [the person] approaching the crossing, was negligent in going upon the crossing in front of a rapidly approaching train, thinking that he could cross in safety; and if it appears also that the engineer after discovering that such person [plaintiff or decedent] was negligent, negligently failed to slow down or slacken the speed, or to stop the train, thinking or assuming that such person would be able to cross in safety, and the collision occurred by reason of the mistake or miscalculation of both, then such injury resulted proximately from the concurrent acts of both and the plaintiff can not recover.¹

¹ Railroad v. Kistler, 66 O. S. 326.

Sec. 2206. Duty of gateman in lowering gates.

The jury is instructed that it is the duty of a gateman employed at a railroad crossing to exercise ordinary care in the operation of the gates to avoid letting them down on any one in the street.

It is the duty also of persons about to cross a railroad crossing where gates are maintained and operated by gatemen, to use ordinary care in watching for the lowering of such gates, although it may not be required of them that they be continually on the watch of the movements of the gate.

In the exercise of ordinary care by the gateman he is required to keep the gate under such reasonable control at all times and to keep a lookout on the street. He must observe reasonable care to avoid letting the gates down on any one in the street, or to let the same down unannounced or unexpectedly when a traveler starts to cross the tracks.¹

¹ *Sager v. R. R. Co.*, 70 Kan. 504; *Feeney v. R. R. Co.*, 116 N. Y. 375, 5 L. R. A. 544; *O'Keefe v. R. R. Co.*, 108 Mo. App. 177. See note Ann. Cas. 1913, B. 800.

Sec. 2207. Duty of driver of automobile at crossing.

While the use of the automobile as a mode of travel in highways and streets may develop new phases of questions of reciprocal rights and duties in some respects, still the general doctrines of the law become applicable to those operating the same in relation to the use of grade crossings over railroads.

The same obligation and duty is imposed on a driver of an automobile before passing over a railroad crossing at grade to stop, look and listen before crossing the same.¹ The application of this rule in such case is simpler and less difficult than to drivers of vehicles because there is no danger when the automobile is in close proximity to the railroad track.² The same rule applies where the vision is obscured or restricted, it being the duty of the driver to stop at a point in such close proximity to the tracks of the railroad as will render the vigilance of the driver effective.³ So if the crossing is located at a point where the vision is not only obstructed but where there is such noise as to render it difficult to hear the approach of a train vigilance commensurate with the situation is required.⁴

So whether the driver observed ordinary care, whether he stopped a sufficient length of time, or at a place where it would be effective, or under such circumstances and conditions as to learn and know the conditions and circumstances is for the jury.⁵

¹ *Brommer v. R. R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N.S.) 924; *Horandt v. R. R. Co.*, 81 N. J. L. 488; *Spencer v. R. R. Co.*, 123 App. Div 789, 108 N. Y. S. 245, 197 N. Y. 507. But see *Walters v. R. R. Co.*, 133 Pac. 357.

² *Chase v. R. R. Co.*, 208 Mass. 137.

³ *Railroad v. R. R. Co.*, 168 Fed. 21, 93 C. C. A. 413, 21 L. R. A. (N.S.) 794.

⁴ *Dickinson v. R. R. Co.*, 81 N. J. L. 464, 37 L. R. A. (N.S.) 150.

⁵ *Bush v. R. R. Co.*, 232 Pa. St. 327. See note 46 L. R. A. (N.S.) 702, where authorities are collected.

Sec. 2208. Driver of an automobile may rely on gateman giving notice.

The jury is instructed that where a gate or a flagman is maintained at a crossing, a person driving an automobile has the right to assume that the gate will be lowered if a train is approaching, or that a signal will be given, so that there is no duty or obligation resting upon such driver requiring him to stop, look and listen in such case.¹

¹ *Roby v. R. R. Co.*, 130 La. 880, 58 So. 696.

Sec. 2209. Driver of automobile placed in sudden peril at crossing.

The jury is instructed that where the driver of an automobile is placed in a position of sudden peril or in imminent danger in attempting to cross over a railroad crossing he is not required to act with the same degree of care and precaution, as he would under other circumstances when he had more time for reflection and deliberation.¹

So therefore, etc.

¹ *Dickinson v. R. R. Co.*, 81 N. J. L. 464, 37 L. R. A. (N.S.) 150; *Hull v. R. R. Co.*, 60 Wash. 162; *Railroad v. Vidal*, 184 Fed. 707, 106 C. C. A. 661.

Sec. 2210. Imputing negligence of driver to occupant of automobile.

The jury is instructed that the negligence of a driver of an automobile in approaching a railroad crossing in failing to slow down just before reaching a point where a view of the railroad track could be had, can not be imputed to a passenger in such automobile who is himself not guilty of any neglect.¹

¹ *Wachsmith v. Railroad*, 233 Pa. St. 465, 82 Atl. 755. Ann. Cas. 1913, 679, note and cases.

Sec. 2211. Injury caused by backing train on vehicle at crossing.

You must find that the backing of the train onto the wagon, resulting in the injury, was done by the servants of the defendant railway under such circumstances as evidences want of ordinary care on the part of such servants, showing negligence on their part. If the backing was accidental and without volition on the part of the agents or servants of the defendant, then it would not be chargeable with the negligence or liable for an injury resulting therefrom. To make the defendant company liable for the injury in this case it is imperative that it be made to appear by evidence that the agents of defendant in charge of the train negligently backed the train and produced the injury sought to be recovered for by the plaintiff in this action.

If the train of defendant was standing still, with its rear end occupying a part of the public crossing only, there remaining space sufficient for the passing and repassing of teams, it would be the duty of the servants and agents of defendant, before backing or running said train farther onto or across such crossing, to first make use of their faculties of seeing and hearing to ascertain if there was danger of injuring someone, to learn if the crossing was occupied or not, and to be careful so as not to unnecessarily inflict any injury. And if the agents and employes omitted to use their faculties, but instead, without warning or signal, suddenly backed their train onto the said crossing and injured plaintiff, the said employes and agents would be guilty of negligence, so as to make the defendant company liable for any resulting injury.¹

¹ J. H. Day, J., in *L. E. & W. R. R. Co. v. Stadler*, supreme court, unreported, No. 2870 (14, 708).

Sec. 2212. Injury to child climbing over train stopping on crossing—Negligence under such circumstances.

If you find, as a fact, from the evidence in the case, that the train in question did not occupy the street-crossing for a period

of more than five (5) consecutive minutes, or if you should find that such train did occupy said crossing for more than five (5) minutes, but not unnecessarily, then the fact of the train occupying said crossing is an immaterial matter in this case, and it is not to be further considered by you. If, however, the plaintiff, by a preponderance of the evidence, has proven that said train did occupy said street-crossing for a period of more than five (5) consecutive minutes immediately preceding the injury occurring to the plaintiff, and that such occupancy was not necessary, then the fact of such unnecessary occupancy may be considered by you, together with any other proper facts and circumstances that may be in evidence in the case, as bearing upon the negligence of the defendant. If such train did so unnecessarily occupy said crossing for more than five (5) consecutive minutes, there was not, on that account and as a matter of law, any obligation upon defendant's servants to sound a whistle, ring a bell, or do any other specific act before starting said train in motion either backwards or forwards; but under such circumstances, defendant's servants would be bound to do anything, and to leave undone nothing that an ordinarily prudent man, under all the circumstances, would have done. Any precaution that an ordinarily prudent man would have taken under the circumstances, and any warning he would have given, the defendant was bound to give; and if the ordinarily prudent man would have taken no precaution, or would have given no warning, the defendant was then bound to take no precaution, or to give no warning.

The law did not, at the time of the injury complained of, require the defendant company to prevent persons or boys from going upon or between the cars of its train while the same was at rest over the street crossing in question, and so a failure upon the part of the defendant to warn or prevent plaintiff from so attempting was not an act of negligence upon the part of the defendant that would entail liability upon the defendant, unless you find that the defendant or its employees had knowledge that plaintiff was upon or between its cars, or unless you find that an ordinarily prudent man, under the circumstances, would by some

precaution have known that the plaintiff was upon or between its cars.

If you should conclude from the testimony in the case that the defendant or its employes were not guilty of any negligence, then your inquiry may cease, for in such case your verdict should be for the defendant, no cause of action.

If you find that the defendant or its employes were guilty of negligence, you will then determine from the evidence whether or not the negligence caused the injury complained of. And if you find that the defendant was negligent, still the plaintiff shows no right to recover unless it should be proven that the negligent act caused the injury to the plaintiff, and that the plaintiff was free from contributory negligence, as I shall hereafter charge you.¹

¹ W. T. Mooney, J., in *L. E. & W. Ry. Co. v. Mackey*. Approved in 53 O. S. 370.

Sec. 2213. Same, continued—Whether child climbing over train guilty of contributory negligence.

If you should find that the defendant was negligent, and that such negligence caused the injury, you will go on and determine this further question: "Was the plaintiff, at the time of the injury complained of, himself in the exercise of ordinary care, or did his own negligent act contribute to his own injury?" This question becomes important from the fact that if it should be your conclusion from the testimony in the case that the plaintiff was injured as the result of the want of due care of both the plaintiff and defendant, then the plaintiff could not recover. The plaintiff, to recover, must be free from all negligence on his part.

The plaintiff here was, at the time of the injury, an infant of the age of nine (9) years and two (2) months. While a child of that age is not bound to take all the precaution and exercise all the care that an adult would be required to take and exercise, yet this plaintiff was required to use all care that an ordinary prudent boy of his age and capacity would have exercised. And if you should find from the testimony that

plaintiff, by reason of his educational advantages and experience, was of more than ordinary capacity, then it is his capacity, as you find it to exist, that must measure his duty to detect and avoid danger.

Hence, if you should find from the testimony that the plaintiff knew that it was dangerous to go between the freight-cars at the time in question, or if you should find that an ordinary prudent boy of his age and capacity would not have gone between the cars, under the circumstances as you shall find them, then the plaintiff was guilty of negligence and can not recover. It is not necessary that plaintiff should have apprehended the injury that did occur; all that is necessary is that he knew, or should have known, that the situation was dangerous, and that an injury of some kind would probably befall him in that situation.

If you should find that the injury happened without the want of care of either plaintiff or defendant—that is to say, if each party was not negligent—then the injury would be the result of a mere accident, and, of course, in such case the plaintiff could not recover, but your verdict should be for the defendant—no cause of action.

If, however, it should be found by you that the defendant company was negligent, and that said negligence caused the injury complained of, and you should further find that the plaintiff, at the time of the occurrence of said injury, was in the exercise of the due care to which he was bound, as I have charged you, then, and not otherwise, is the plaintiff entitled to recover in this action.¹

¹ W. T. Mooney, J., in *L. E. & W. Ry. v. Mackey*. Approved in 53 O. S. 370.

Sec. 2214. Shunting cars, while making flying switch, across street crossing.

The jury is instructed that it is the duty of a railroad company not to make "flying switches" across a busy street of a city without exercising ordinary care in giving such warning to travelers in the streets as will be reasonably commensurate

with the dangers incident to such act. To make such flying switches without warning and signal, and with no other precautions to ensure the safety of passers-by constitutes negligence.¹

¹ *Williams v. Railway*, 63 Wash. 57, 114 Pac. 888. Ann. Cas. 1912, D. 340.

Sec. 2215. Presumption that every person exercises care for his own safety when in danger—Burden of proof on defendant to prove decedent did not look and listen before crossing track.

The jury is instructed that it is a presumption of law that every man exercises due care for his own safety when in a place of danger, and the presumption is that the deceased did so when he approached the crossing.

The court instructs the jury that the plaintiffs need not affirmatively prove that the deceased looked and listened for the train before coming upon the crossing. The presumption is that he did so, and the burden of proof that he did not is on the defendant railway company, and it must be proved by a preponderance of the evidence.¹

¹ *Evans v. Railroad*, 37 Utah, 431, 108 Pac. 638. Ann. Cas. 1912, C. 259, where the above was approved.

Sec. 2216. Defendant liable, though statutory signals given—When other acts of negligence charged.

The jury is instructed that although the defendant company may have complied with the statutory requirements of ringing the bell or sounding the whistle when approaching a public crossing, yet it is bound to adopt such other reasonable measures for the safety of persons in passing over the crossing as ordinary and reasonable prudence may require, considering the danger, travel, and surrounding circumstances. If it appears from the evidence that some one of the negligent acts charged in the complaint caused the injury to plaintiff, he may recover.¹

¹ This is merely a suggestive proposition. It was approved in *Evans v. R. R.*, 37 Utah, 431. Ann. Cas. 1912, C. 259. See *Bruggeman v. Railroad*, 147 Iowa, 187, 123 N. W. 1607. Ann. Cas. 1912, 876, where similar charge was given and criticized.

CHAPTER CXXIX.

RAILROADS—MISCELLANEOUS CASES OF NEGLIGENCE. LICENSEES—TRESPASSERS—FIRES—STOCK BLOCKING FROGS—SWITCHES.

SEC.

2217. Duty to persons habitually permitted to travel over tracks.

2218. Common use of tracks by public as passageway.

2219. Injury to one walking on track—Company bound to give warning after discovery.

2220. Duty of company to trespassers on track arises only after discovery.

2221. Required to guard against fire from locomotive.

2222. Negligent communication of fire from engine.

2223. Injury to stock on railroad.

2224. Escape of horse by reason of insufficient fence.

2225. Misplacement of switch for criminal purpose.

2226. Failure to block frog.

2227. Omission to adjust, fill or block switch.

SEC.

2228. Liability of company for injury to person standing on depot platform, from mail pouch thrown from mail car.

2229. Injury to person traveling on right of way long used by public caused by lump of coal falling from car, producing unconscious condition, being struck by yard engine while in such condition.

1. Company owes plaintiff no duty except to refrain from willfully and negligently injuring him after discovering his presence and peril.

2. Duty upon discovery of peril, to exercise ordinary care to avoid injury.

3. Must be something in appearance of plaintiff to indicate that he was helpless and in danger—Otherwise it may be assumed he will leave the track.

Sec. 2217. Duty to persons habitually permitted to travel over tracks.

If you find from the evidence in this case that the defendant companies, for a long time prior to the accident complained of

in the petition, permitted persons to travel and pass habitually over their road at the point where the accident occurred without objection or hindrance, they should, in the management of trains so long as they acquiesce in such use, be held to anticipate the continuance thereof, and are bound to exercise care, having due regard to such probable use and proportioned to the probable danger to persons so using such crossing, and if you find they did not exercise such care, and that the plaintiff exercised reasonable care on his part, then your verdict on this branch of the case should be for the plaintiff.¹

¹ From *Caldwell v. P. C. & T. R. R. Co.*, 51 O. S. 609. The common pleas court was reversed, but this charge was not affected thereby.

Sec. 2218. Common use of railroad tracks by public as passageway.

You are instructed, as matter of law, that the plaintiff was not a trespasser by going upon the track in question. That is, if you find from the proof in the case that the railroad company had knowledge that its tracks were being used at this point by people to go to and from their work at the mill or other places, and that the railroad company had knowledge of such use of its tracks and acquiesced therein, and the plaintiff was not bound to go to his work by any particular route, and had a right to go upon and over the track where he was when injured, but in doing so it was his duty to exercise ordinary care to prevent being injured. * * * If these tracks in question were used by the public indiscriminately as a place of travel to the mill or other places, then it would be the duty of the company to so run its trains and to exercise ordinary care in the use of its trains with a knowledge of the way in which it permitted its tracks to be used.¹

¹ *Burke v. Hitchcock, Trumbull Co. Com. Pleas.* Gillmer, J.

Long accustomed usage of a passageway on tracks of company by trespassers, charges the company with notice and it is under obligation to keep a careful lookout at such places. *Wood on Railroads*, sec. 320.

Sec. 2219. Injury to one walking on track—Company bound to give warning after discovery.

“If it be found from the testimony that the plaintiff, at the time he was injured, was walking upon the main track of a railroad, and was not using the county road as a crossing to reach the point he wished, the fact that no signal was given by the engineer in charge of the engine of the moving of the engine and cars attached toward the crossing would not be such neglect as would render the company liable for the injury, unless the conductor or engineer in charge of the train or engine knew, at the time the train was being backed, that the plaintiff was on the track, and they then failed to give him warning, by signal or otherwise, of the approach of the train in the same direction on the same track.”¹

¹ From *Railroad Company v. Depew*, 40 O. S. 121.

Sec. 2220. Duty of company to trespassers on track—Arises only after discovery.

The law imposed no duty upon the defendant to require its station agents, watchmen, flagmen or switch tenders having duties to perform at certain points, to watch over the tracks of the roadway from such places of their special duty, to warn persons on the track without right, and having no business with the defendant, to get off the track, or otherwise caution them. The defendant is only accountable for the action of its employes after they had discovered or had reason to think or believe the deceased was on the track and in danger of being hurt; after they had discovered the boy on the track, or had reason to think or believe he was there, they had, of course, no right to wantonly run over him. But the servants of the defendant who had any duties to perform in *regard to the running of this train*, did their whole duty if they did all they could with the means they had, adapted to that purpose, to avoid injury to the deceased. Strictly the defendant is not liable in this case, unless its said servants who had duties to perform in reference to the running

of this train, after the boy was discovered, or they had reason to believe the boy was there and in danger, acted with such a want of care and with such a reckless disregard of the consequences as is difficult to be distinguished from an intentional wrong. If they acted with this recklessness and want of care, your verdict should be for the plaintiff; otherwise it should be for the defendant.¹

¹ John W. Heisley, J., in Spink case, in Cuyahoga county, O.

A railway owes no duty to a trespasser on its track further than to refrain from inflicting a willful or malicious injury. Wood on Railroads, sec. 320.

Sec. 2221. Required to guard against fire from locomotive.

Railroad companies are in no sense insurers, but in this state are required by statute, in the use of their engines, to prevent loss or damage by fire, to place on their locomotives, or engines, and keep in good order, some device or contrivance that will most effectually guard against the emission of fire and sparks which would otherwise be thrown out by such engine, or locomotive, or cars, having regard to the enterprise in which they are engaged and the objects to accomplish, and the law places no higher or further duty upon them than in this particular; and when they have performed that duty required of them by statute, they are not responsible for accidental fires caused by the escape of sparks thrown from their engines.¹

¹ Approved in *The L. & M. R. R. Co. v. Kelly*, 10 O. C. C. 322, 327; *C. L. & W. R. R. Co. v. Fredenbur*, 3 C. C. 23.

Sec. 2222. Negligent communication of fire from engine.

To entitle the plaintiffs to a verdict at your hands it is incumbent upon plaintiffs to prove by a preponderance of the evidence, that is by the greater weight of the evidence, that the fire in question was caused by a spark or sparks emitted from an engine of the defendant, the H. V. Ry. Co., passing over its line of railway in a northerly direction, as averred in the petition.

The defendant is not required to prove how the fire was caused to entitle it to a verdict. The burden is upon the plaintiffs to show by a preponderance of the evidence that it was caused by sparks from the defendant's engine.

You will observe that no one has testified in this case to seeing the fire communicated from the engine of the defendant company to the building of the C. I. M. & C. S. Co. Its communication from the fire from the engine of the defendant to the buildings of the C. I. M. & C. S. Co., is the ultimate fact to be proven by the plaintiffs to entitle them to recover in this case.

When a witness sees the ultimate fact to be proven and testifies to it in court, this is what is known as direct evidence. But it is not always possible to establish a fact by direct evidence and this is not required under the law. A fact may be established by circumstantial evidence. Circumstantial evidence is the proof of facts which stand in such relation to the ultimate fact to be established by proof that the ultimate fact may be reasonably inferred from the proven facts.

The question in every case is what weight should be given to the evidence, whether it be direct or circumstantial. In civil cases it suffices to establish the plaintiff's case if the evidence, whether direct or circumstantial, creates a preponderance of the proof in favor of the plaintiff.

And that is the question to be determined by you in this case. Does the proof of the surrounding facts and circumstances create a preponderance of the evidence in favor of the plaintiff's claim that the fire was caused by sparks from an engine on the line of the defendant's road, as alleged in the petition?

You should consider all of the evidence in this case and ask yourselves is there evidence of greater weight tending to establish the plaintiffs' claim that this fire was caused by sparks from the defendant's engine than there is that it was caused in some other way. If your answer to that question is in the affirmative, then your verdict should be for the plaintiffs. But if your answer is in the negative, your verdict should be for the defendant.

The petition avers that on the day in question, at about six o'clock p. m., the buildings were set on fire by sparks emitted from an engine passing over the defendant's line of road. It is not essential to the plaintiffs' right to recover, gentlemen of the jury, that it should be proven that the sparks were emitted from the engine at the hour of six o'clock. The essential matter to be proven by the plaintiffs is that the fire which occurred on that day was caused by sparks emitted from an engine passing along on the defendant's road some time before the fire, but the hour at which the engine passed need not be proven to have been just at six o'clock. But it is, of course, important for you to consider, gentlemen of the jury, the time at which the engine of the defendant company passed north on the defendant's line of road on that afternoon, and the time when the fire occurred, in determining whether or not the cause of the fire was sparks from the defendant's engine. That is you should consider the time at which defendant's trains passed north on that afternoon in relation to the time when the fire started upon the question of the probability of the fire having been caused by sparks from an engine on the defendant's road.

If you find for the plaintiffs, your verdict should be in such an amount as you may find represents the actual loss caused to the property of the C. I. M. & C. S. Co. by the fire. But this must not exceed the amount paid by the plaintiffs to the C. I. M. & C. S. Co. and interest on the same from the time when the insurance companies made payment to the C. I. M. & C. S. Co. to this date at the legal rate of six per cent. per annum.¹

¹ Aetna Ins. Co., *et al.*, v. The Hocking Valley Ry. Co., *et al.*, Com. Pleas Court, Franklin Co., O. Bigger, J.

Sec. 2223. Injury to stock on railroad.

"If the jury find that the horse, though seen by the engineer, was running upon the track, if he left it and continued to run, not near enough to have been in danger, and the whistle was blown, and the horse returning to the track, the brakes were applied and the train was checked, but could not probably then

have been checked before the horse was struck by the train, the plaintiff can not recover on the ground of the negligence or carelessness of the defendant in running the train.”¹

¹ *Railway Co. v. Smith*, 38 O. S. 410.

Sec. 2224. Escape of horse by reason of insufficient fence.

“The company being bound to maintain a sufficient fence, the plaintiff had a right to rely on this, and to turn his horse into the inclosure; and if he escaped therefrom by reason of the insufficiency of the fence, and went upon the track and was killed, the company is liable.”¹

¹ *Railway Co. v. Smith*, 38 O. S. 410.

Sec. 2225. Misplacement of switch for criminal purpose.

The defendant company can not be held responsible for the death of one of its employes caused by circumstances of which it had no knowledge or notice long enough before his death to have interposed to save him, or which circumstance or circumstances it had not reasonable ground to expect or anticipate would occur when and where they did occur.

The law does not require a railroad company in Ohio to anticipate or presume that a criminal will break or open its locks and misplace its switches in the night. Nor is there any rule of law that requires a railroad company to keep either a man or a light at every switch at all times.

The presumption of law is that criminals will not break and misplace railroad property; and the railroad company may safely rely on this presumption till the contrary fact is, in any case, brought to their knowledge, or until, from known facts, they have reasonable cause to expect or anticipate it.

If you find from the testimony that the switch was misplaced by someone for criminal purpose, and that the misplacement of the same was unknown to defendant, or, with the exercise of ordinary care, could not have been known by it in time to avert the danger and prevent the injury, or, with the exercise of

ordinary care on its part, could not have been made known to those running the train in time to prevent the injury, the defendant would not be liable for such displacement and consequent injury, unless such displacement could have been prevented by the exercise of ordinary care on its part.¹

¹ Geo. F. Robinson, J., in *N. Y. P. & O. R. R. Co. v. Tidd*, supreme court, No. 2507. Affirmed by circuit court and see.

Misplacement of switch by evil disposed person, causing injury, regarded as an inevitable accident. *Frust v. Potter*, 17 Ill. 416; *Deyo v. N. Y. R. R. Co.*, 34 N. Y. 9.

Sec. 2226. Failure to block a frog.

As bearing on these questions, it is admitted in the pleadings, and not controverted in the trial, that the frog of the switch at which the injury occurred was not blocked. It is my duty to charge you, as a matter of law, that the failure on the part of a railroad company to block a frog is, in itself, negligence, and such failure being admitted in the case by the defendant, you will be authorized to determine at once the first of the questions to which I have just referred in the affirmative, and decide that the defendant was guilty of negligence, and other facts appearing and existing, the plaintiff would be entitled to recover.¹

¹ W. T. Mooney, J., in *C. & E. R. R. Co. v. Purviance*. R. S., secs. 8516-31, requires railroads to adjust, fill or block the frogs, switches, etc., so as to prevent the feet of its employees from being caught therein. Neglect to comply with statutory duty is negligence *per se*. *Wood on Railways*, sec. 397.

Sec. 2227. Omission to adjust, fill or block switch.

Your attention is called to the statute on that subject. It has been enacted by the legislature of Ohio, and such was the law at the time this injury occurred, that "Every railroad corporation operating a railroad or part of a railroad in this state shall, before the first day of October in the year 1888, adjust, fill, or block the frogs, switches, and guard-rails on its tracks, with the exception of guard-rails on bridges, so as to prevent the feet

of its employes from being caught therein, and the work shall be done to the satisfaction of the railroad commissioner." ¹

Now then, taking into account the law, that goes to the jury as a part of the evidence, for them to consider whether or not it was negligence on the part of the defendant in leaving any frog, switch, or guard-rail unblocked; and you may consider, or first I should say to you, perhaps, that it is for the jury to judge of the credibility of the witnesses, the credibility of the testimony, the confidence that they should place in the statements of the witnesses.

Now, going back to this matter of the obligation of the company to block these switches, frogs, and guard-rails, it is alleged by the plaintiff that the defendant carelessly omitted to adjust, fill, or block this switch where the plaintiff caught his foot. A great deal of evidence was submitted to you as to the practicability of doing that. And you are to take that into account and say whether it is practicable, whether it would obviate the danger or diminish the danger of being caught there at that place where the plaintiff claims he was caught, or where his foot was caught. Consider whether it would interfere with the operation of the road, and the operation of the cars over these tracks, seriously; and determine that question, whether it is practicable, on the whole, to block that place, whether the omission to block it was negligence on the part of the company, taking into account all the evidence on that subject, taking the opinions of the witnesses as to how the tracks are to be used there, their statements on that subject, what would be the openings there with a block in there, when the switch was turned, and whether that aperture or opening between the rail and the block when the switch is open, whether that would leave the same danger that would exist without the blocking, whether, with that block there, it would prevent the split of the rail from being close to the stationary or bent rail, as they call it, so as to produce the danger of derailing the cars that go across there. Take all those matters into account, and say whether, fairly and reason-

¹ Code, sec. 9009, 9009-1.

ably, there ought to have been a block there; and then say whether you find it established by a preponderance of the evidence that the defendant was negligent in not blocking it there. And if you find that that is made out by the evidence, why, then you may take that as established, and that will be one step towards a verdict for the plaintiff. If that is not made out, if you find that it is not practicable, if you find that the defendant was not negligent in failing to block that place there, why, then that is the end of your inquiry, and your verdict must be for the defendant, because that is the negligence charged in the petition. But if you find that is established, as I have said, then go further and ascertain whether it is made out that the plaintiff was caught in that way.

I should say to you that the law on this subject, requiring these frogs, switches, and guard-rails to be blocked, is to be taken into account as the requirements of the legislature on that subject, and in view of all the facts and situation as to whether that was negligence in failing to block that place. Although the law might require it, still it does not follow, as a matter of course, that, because the law requires it, the defendant was negligent in not complying with it; but that may be taken into account on this subject, and it is for you, on all the facts in evidence and the situation there, to say whether the failure of the defendant to put a block there was negligence. Is that made out? Then consider whether the plaintiff was caught there as he says, whether that is made out—for he has to make that out—consider whether his own negligence contributed in any way to his injury in performing his work there, going in between the cars as he did, if he went in between them, his acts there. Look it all over, consider everything.²

The following requests were given by the court:

If W., when he went in to uncouple the car at and in the vicinity of the switch in question, knew, or, by the exercise of

² Gilbert Harmon, J., in *The L. S. & M. S. Ry. v. Winslow*, supreme court, No. 4357. Settled and dismissed in supreme court, but charge affirmed by circuit court.

ordinary observation or reasonable skill and diligence in his department of service, he might have known that he was going to be exposed to the danger and risk of having his foot caught in the movable rail of said switch, and, notwithstanding such knowledge or means of knowledge, he stepped in to uncouple the said cars, he assumed the risks of being so injured, and waived all damages and injury that should thereby result to him.

If the plaintiff, after having a reasonable opportunity of becoming acquainted with the risks and perils of his service, accepts them, he can not complain if he is subsequently injured by such exposure.

The company did not guarantee to the plaintiff the absolute safety and sufficiency of its machinery or appliances, but was bound to exercise only ordinary and reasonable care; that is, such a degree of care and prudence as ordinarily prudent persons or corporations engaged in like business exercise under similar circumstances. The railroad company was not bound to use extraordinary care, nor was it required to do what was impracticable or unreasonable.

If the jury find from the evidence in this case that it was impracticable to so adjust, block, or fill the movable rails of this switch at the place where the injury happened, then it was not negligence on its part in omitting so to adjust, block, or fill the movable rails of said switch.

If the defendant company adopted such methods as were reasonable and practicable for the safe running of its trains, as well as to guard against injury to its employees, at the place where this injury happened, then it used and exercised ordinary and reasonable care, and can not be held liable for any injury happening to said plaintiff at said switch, even though his foot was caught therein.

The omission of the railroad company to comply with the provisions of the statute requiring frogs and switches to be blocked is not, in and of itself, conclusive proof of negligence that will render a railroad company liable for an injury resulting from such omission, but such omission may be and should

be considered by the jury in connection with all the other facts and circumstances of the case.

If the jury find that the plaintiff knew how these movable rails were constructed and operated, or, by the exercise of reasonable care and prudence on his part in the performance of his duties, should have known thereof, and that the company insisted upon maintaining such condition and construction, and thereafter continued to and did remain in the service of the defendant, then he took upon himself and assumed all the usual risks and perils incident thereto.³

³ Given by request by Harmon, J., in *The L. S. & M. S. Ry. v. Winslow*. Under the Ohio law the United States Circuit Court held that where two railway companies receive cars from each other over a delivery track at a certain point, a person employed by one of them to take the number of its cars and inspect their seals, as trains are made up at such place by the other, is an employee of the latter. *Alkyn v. Wabash Ry. Co.*, 41 Fed. 193.

Sec. 2228. Liability of company for injury to person standing on depot platform, from mail-pouch thrown from mail-car.

If you find from the evidence that the mail agent was in the employ of the postoffice department of the United States government, and was not in the employ of the defendant railway company, and was not under the control or direction of the defendant company, or any of its agents or employees, then said defendant would not be liable for any of his negligent acts. If you find the defendant railway company was negligent in carrying the United States mails on its trains, it was its duty to make such arrangements for the delivery of such mails at the stations, as not to unnecessarily endanger the passengers of said defendant company, or those lawfully on its platform and grounds. And if it was required of the said defendant company by the postoffice department of the United States to deliver the mail-bags on the platform of the depot at ———, it was the duty of the said defendant company either to stop its trains at ———, or to run its trains at such rate of speed

past said depot as not to unreasonably endanger the passengers of said company, or those lawfully on its platform or grounds, or to so guard said platform and to give notice to the people lawfully thereon, as not to expose them to unnecessary or unreasonable danger.

And if said railroad company ran its trains at such unreasonably high rate of speed past said station, and knowingly permitted the mail agent to throw off the mail-bags upon the platform of said station, without giving due notice to the persons lawfully thereon, or in some way protecting them from the danger thereof, said railroad company would be liable for any damage caused by the negligence of the agents and servants of the company in running said train, and in permitting said mail-bags to be thrown off without due notice to the persons lawfully on said platform, or in some other way protecting them from unreasonable and unnecessary danger. It is left to you as a question of fact to say whether the train to which the mail-car was attached was run at such high rate of speed as to be negligence of the part of the company, or whether the agents or servants of the company were negligent in failing to give due notice to the plaintiff that the mail-bag was about to be thrown upon the platform, or in protecting plaintiff from injury therefrom.¹

¹ Nye, J., in *Clarke v. N. Y. P. & O. R. R. Co.*, Medina Co. Com. Pleas, see 136 Mass. 552, 97 N. Y. 494.

Sec. 2229. Injury to person traveling on right of way long used by public caused by lump of coal falling from car, producing unconscious condition, being struck by yard engine while in such condition.

1. *Company owes plaintiff no duty except to refrain from willfully and negligently injuring him after discovering his presence and peril.*
2. *Duty upon discovery of peril, to exercise ordinary care to avoid injury.*

3. *Must be something in the appearance in the plaintiff to indicate that he was helpless and in danger—Otherwise it may be assumed he will leave the track.*

1. *Company owed plaintiff no duty except to refrain from willfully and negligently injuring him after discovering his presence and peril. It appears from the undisputed evidence in this case that at the time when the plaintiff received his injury he was walking along the right of way of the defendant company, and not upon any public street or highway, nor at any intersection of any street or highway, and the defendant's right of way and tracks, but was using the defendant's right of way and tracks as a convenient road to his work. He was not upon the defendant's right of way by its invitation, either expressed or implied, but solely for his own convenience, and he was therefore what is known in law under these conditions as a bare licensee. That being true, the company did not owe him any duty to exercise care for his safety, except the duty to refrain from willfully and negligently injuring him after discovering his presence and peril. At all crossings of streets and highways, and at other places where the public have a right to be, it is made the duty of the railway company to exercise ordinary care for the safety of persons who may have occasion to go upon and cross its tracks, and this duty requires it to keep a proper lookout ahead to discover their presence. The measure of its duty to persons under such circumstances is that degree of care and caution which persons of ordinary prudence and caution are accustomed to use under like circumstances and conditions. But when persons go upon a railroad company's right of way at places where they have no right to go, the company is not required to exercise care for their safety, except, as I have said, to refrain from injuring them willfully and wantonly after discovering their peril. Persons who go upon a railway company's tracks at places where they have no right to go, as was the case with the plaintiff when he used this right of way as a convenient road to and from his work, instead of going by*

the public streets and highways of the city, takes the risks of injury, and can not therefore recover if they receive injuries on account of the defendant not exercising care for their safety. The plaintiff can only recover, as I have already said, in case the evidence shows that the agents and servants of the defendant company in charge of its engines and trains willfully and wantonly inflicted injuries upon him after discovering his presence and peril.

If, therefore, you believe the fact to be that the plaintiff was injured, first, by a lump of coal falling from an overloaded coal-car, even though you may be of the opinion that it was negligence on the part of the defendant company to transport loaded coal cars over its lines, yet the plaintiff can not recover for that injury because when he undertook to travel along the defendant's right of way by the side of its loaded and moving coal-trains he assumed the risk of injury from coal falling off of the cars, because the plaintiff's own evidence shows that this was the usual and ordinary manner of loading the coal-cars, and was therefore a known danger.

The plaintiff claims that by this blow upon the head he was rendered unconscious, and that while in this unconscious condition he was run down by an engine coming south and operated by the agents and servants of the defendant company in a negligent and careless manner.

2. *Duty, upon discovery of peril, to exercise ordinary care to avoid injury.* In determining whether or not the defendant company is liable to the plaintiff in damages for causing this second injury, you will still keep in mind that the defendant did not owe to him the duty of exercising ordinary care for his safety, but if you find the fact to be that the defendant company, through its agents and servants, or any one of them, engaged in the operation of the freight train or the locomotive, discovered the fact that the plaintiff was injured and in a position of danger, then it became its duty to exercise ordinary care to avoid injuring him; and if it failed to do so, and its failure so to do resulted in injury to the plaintiff, the defendant will

be liable for the injuries resulting therefrom. If you find the fact to be that some employee or employees of the defendant company engaged in the operation of its freight train going north, or the engine coming south, had notice such as a person of ordinary prudence would believe and act upon, that the plaintiff was injured, and that he was exposed in a helpless condition to the danger of injury from a passing locomotive or train, then the company owed to him the duty of observing due care to prevent his being so injured, notwithstanding he was upon its tracks at a place where he had no right to be. Not to do so would be to willfully and wantonly inflict injury upon him. It is, therefore, your duty to inquire whether or not any employee or employees of the defendant company did have actual notice that the plaintiff was injured and exposed to danger in sufficient time that by the exercise of due and proper care the plaintiff could have been saved from being run over by the locomotive coming from the north.

It is the plaintiff's claim that the coal-train from which he testifies the lump of coal fell and struck him on the head had passed by him before the locomotive ran over him, and that someone was standing on the rear of the caboose. It will be your duty to determine whether or not that is the case; that is, whether a coal train did pass by him before he received the injury to his leg, and if so, whether an employee of the company had notice of his condition.

The defendant has introduced evidence by its chief train dispatcher touching the number of freight trains going north that afternoon at about the time of this injury. You will look to that and all the evidence to decide the question as to whether or not the plaintiff is correct or mistaken when he testifies that the coal-train had entirely passed by him before he was run down by the engine. Of course, if you find that the coal train from which the coal fell had not passed by him when he was run down by the locomotive, then there can be no question of an employee of the defendant company on the rear of the caboose learning of the injury to the plaintiff. But if you find that

there was a coal-train going north, which had entirely passed by before he was run down by the locomotive, you will inquire whether or not anyone connected with the management and operation of that freight train had notice of his injury, and if so, whether such notice was obtained in time to have avoided the second injury to him by the exercise of ordinary care in that behalf by stopping the coal train or giving notice to those in charge of the locomotive which ran over his legs, of the plaintiff's perilous situation. Of course, any persons in charge of the coal-train were under no obligation to give notice that the plaintiff was walking along its tracks, unless they had notice of his injury and disabled condition. They had no duty to perform toward the plaintiff unless you find from the evidence that some person connected with the operation of the coal-train had such notice as a person of ordinary prudence would believe and act upon that the plaintiff was injured and in a helpless condition, and exposed on account thereof to danger from a passing train.

As regards the engineer in charge of the locomotive coming from the north, if he discovered that the plaintiff was injured, that is, if he had notice from the appearance and conduct of the plaintiff such as a person of ordinary prudence would believe and act upon that plaintiff was injured and in a helpless condition, or that for any reason he was in a helpless condition and exposed to danger of being run over, then it became his duty to exercise ordinary care to avoid injuring him; that is, to use that degree of care which persons of ordinary prudence and caution are accustomed to exercise under like circumstances and conditions; and a failure to exercise such care on the part of the engineer would, if it resulted in injury to the plaintiff, render the defendant company liable in damages for whatever injuries were the result of this want of care on his part.

3. *Must be something in the appearance in plaintiff to indicate to servants of railway that he was helpless and in danger—Otherwise it may be assumed he will leave the track.* It is important for you to consider whether or not there was in the appearance

of the plaintiff at or after this presence on the track was discovered by the engineer in charge of the locomotive which struck him, anything to indicate to the engineer that the plaintiff was not in the possession of his senses. If there was nothing in the conduct or appearance of the plaintiff after he was discovered by the engineer which would lead a person of ordinary condition of helplessness, or in a condition where he was not able to care for himself, then the engineer had a right to presume that the plaintiff possessed ordinary capacity to care for himself, and that he could see and hear, and that as a locomotive approached him he would leave the track, and under such circumstances the engineer was not bound to slacken the rate of speed of the locomotive until it became apparent to him that the plaintiff was not going to leave the track, when it would become the duty of the engineer to use due and proper care to stop his locomotive and avoid the injury.

A failure upon the part of the engineer to use ordinary care to stop after he discovered that the plaintiff was not going to leave the track, or after starting to leave it and was returning to it, would render the defendant company liable for the injuries caused to him by the engineer's failure to use ordinary care. And what would be ordinary care under such circumstances is for the jury, and would be that care which ordinarily prudent persons are accustomed to use under like circumstances.

But if you find the fact to be that the engineer did use ordinary care under the circumstances to stop after he discovered that the plaintiff was not going to leave the track, or was returning to it after starting to leave it, and could not stop in time to avoid the injury, then the defendant is not liable for the injury.

To entitle the plaintiff to recover in this case you must find from a preponderance of the evidence that the plaintiff was for some reason unconscious of his peril, or unable by reason of an injury to escape from it, and that this condition was actually known to some one or more of the employees of the defendant company, and that they obtained this knowledge in

sufficient time to have enabled them to have avoided the injury to him by the exercise of ordinary care on their part. The defendant company was under no obligations to fence its track to keep the public from traveling along its right of way. The defendant was not bound to exercise ordinary care at this point on its tracks, as I have said to you, for the safety of persons who may for their own convenience be upon its tracks, and is only liable to the plaintiff in case you should find that it did not use ordinary care for his safety after discovering his peril. In other words, any negligence of the defendant company prior to the discovery of the plaintiff's peril will not render the defendant company liable for his injuries.¹

¹ Rubel v. Hocking Valley Ry. Franklin county. Bigger, J. Affirmed by circuit and supreme courts.

CHAPTER CXXX.

RAPE, AND ASSAULTS TO COMMIT.

SEC.

2230. Defined.

2231. Consent of female.

2232. Carnal knowledge when complete.

2233. Capacity—Burden of proof where accused under fourteen years of age.

SEC.

2234. Evidence as to character of the woman.

2235. Resistance—Evidence.

2236. Assault with intent to rape.

2237. Same continued—Force—Consent.

2238. Same continued—Declarations of prosecuting witness.

Sec. 2230. Defined.

[By statute, secs. 12413, 12414, 12415.]

Sec. 2231. Consent of female.

The jury are instructed that before you can find the defendant guilty, you must be satisfied beyond a reasonable doubt that carnal knowledge was had against or without the consent of the female. Carnal knowledge with consent is not rape, unless the female person is under sixteen years of age. It is not necessary that want of consent be shown by actual manual resistance, but it must be shown that the consent be given by the female person as a rational and intelligent person. If you find that the defendant had carnal knowledge of the female while she was so drunk as to be unconscious, it is in law having carnal knowledge against her consent; or if the woman is insane, or an imbecile, or asleep, it is against her consent; or if her consent was obtained by threats and fear of bodily harm, although there is no actual violence, it is against her consent.¹

As the law now stands it is not material whether consent has been given by a female under sixteen years or not, as the statute

makes it rape where a male eighteen years of age carnally knows and abuses a female person under sixteen years of age, with her consent. It is now rape to have intercourse with a female under sixteen years with or without her consent.

¹ Clark's Cr. Law, 186-88.

By threats, *Miller v. People*, 42 Mich. 262; *Dickerson v. State*, 40 N. E. 667 (Ind.); *Hawkins v. State*, 136 Ind. 630; *Monroe v. State*, 71 Miss. 196.

Sec. 2232. Carnal knowledge complete, when.

The jury are instructed that carnal knowledge or sexual intercourse is complete upon proof of penetration.¹

The offense is complete if there be penetration only without emission (*emissio seminis*), nor is it necessary that penetration be full and complete, but the slightest penetration of the male organ into the female organ will constitute carnal knowledge within the meaning of the law.²

Before you can find the defendant guilty of rape, you must be satisfied beyond a reasonable doubt that there was some penetration of the male organ of the defendant into the female organ of the prosecutrix.³

¹ Code, sec. 13672. This section does not enlarge the meaning of the statutory provision in relation to rape as to include persons not before amenable, 35 O. S. 52.

² *Williams v. State*, 20 Fla. 777, 5 Am. Cr. 612. See *Blackburn v. State*, 22 O. S. 102.

³ *Massey v. State*, 20 S. W. 758.

Sec. 2233. Capacity—Burden of proof when accused under fourteen years of age.

"If it be found that the accused had sexual intercourse with the child, in the manner stated in the indictment, but that he was, at the time, under fourteen years of age, the burden was on the state to show that he was capable of emitting semen; and the weight which should be given to the evidence, tending to prove or disprove such capacity, is for the consideration of the jury."¹

It is left entirely for the jury to say from the evidence whether or not the defendant was matured sufficiently and had the physical capacity to commit the act. If you find that the defendant was under fourteen years of age, the law presumes him incapable of committing rape; you are instructed that you can not convict him unless it is proven beyond a reasonable doubt that he has arrived at the age of puberty, and is capable of emission and consummating the crime.²

¹ From *Hiltabiddle v. The State*, 35 O. S. 52. The charge above given is not taken from the charge of the lower court, but was suggested by the supreme court as being the proper instruction to the jury under the circumstances.

² *Williams v. State*, 14 O. 227. 8. The statute, 7297, does not change this, 35 O. S. 52; *Wagoner v. State*, 2 Lea, 352; *Gordon v. State*, 93 Ga. 531.

Sec. 2234. Evidence as to the character of the woman.

Evidence has been admitted reflecting upon the character of the woman, and the purpose of the law in admitting such testimony should be explained to you. You are instructed as matter of law that the character of the woman, granting that she is a lewd woman, is no defense to the charge, as rape may be committed against a prostitute as well as against a virtuous female.¹ You are permitted to look to the testimony as to the character of the woman only as a mere circumstance in the case, for the purpose of assisting you in determining whether she has told the truth about the matter, and as reflecting upon the question whether or not the intercourse was voluntary on her part, or without her consent. You must consider this evidence with all the other proof offered in the case.²

¹ *Anderson v. State*, 104 Ind. 467.

² *People v. Crego*, 70 Mich. 319; *Carney v. State*, 118 Ind. 525; *State v. Reed*, 39 Vt. 417; *Pefferling v. State*, 50 Tex. 486.

Sec. 2235. Resistance—Evidence.

You are instructed that the want of consent and actual penetration are both essential to the crime of rape, and you must be satisfied beyond a reasonable doubt that there was both want

of consent and actual penetration before the defendant can be found guilty of the charge. The prosecutrix is bound to resist, unless manual resistance be overcome by fear or threats. The want of consent may be shown by the testimony of the prosecutrix, but this alone without some corroboration is not sufficient; it must appear that she made some resistance, and her testimony may be corroborated by her subsequent conduct, excitement, the condition of her clothes, whether torn, outcries, medical testimony as to the condition of the hymen.¹

¹ *People v. Terwillinger*, 26 N. Y. S. 674; *Richards v. State*, 36 Neb. 17; *People v. Kunz*, 27 N. Y. S. 945; *State v. Connelly*, 59 N. W. 499; *Richards v. State*, 53 N. W. 1027. Walking together not sufficient. *State v. Chapman*, 55 N. W. 489 (Ia.). Fear of disclosing may render corroboration unnecessary, 111 Mo. 569. In *People v. Wessel*, 33 Pac. 216 (Cal.), the jury were charged "while it is the law that the testimony of the prosecutrix should be scanned, still this does not mean that such evidence is never sufficient to convict, and if you believe the prosecutrix it is your duty to render a verdict accordingly."

The jury may properly be charged that if they believe that, at the time of the alleged rape, the prosecuting witness made no outcry, and did not complain to others, but concealed the fact for a considerable length of time, that they may take this into account in determining whether a rape was in fact committed or not. *Territory v. Edie*, 30 Pac. 851.

If the jury believe that the defendant had sexual intercourse with the prosecutrix, and she did not make the utmost resistance to prevent it, still the defendant may be found guilty provided the jury believe that the defendant threatened to use force and do her great bodily injury in case she did not submit through fear of such injury. *Id.* 30 Pac. 851.

Sec. 2236. Assault with intent to commit rape.

The statute of Ohio provides that "whoever has carnal knowledge of a female person forcibly and against her will is guilty of rape." Rape is defined to be the unlawful carnal knowledge of a woman by force and against her will. There are three things, then, necessary to constitute the offense of rape. 1. There must be carnal knowledge of a female person. 2. The act must be done forcibly. 3. It must be done against the will of the female person.

If you find, then, from the evidence that the defendant committed an assault upon the person of the said L., it will become necessary for you to determine with what intent he committed said assault. Did said defendant commit said assault with intent to have sexual intercourse with said L., forcibly and against her will? And before the state would be entitled to a verdict of guilty against the defendant for the crime of assault with intent to commit rape, you must further find from the evidence that at the time he so assaulted the said L., he intended to have sexual intercourse with her forcibly and against her will. It is not necessary, to constitute the crime of assault with intent to commit a rape, that the defendant should have actually had sexual intercourse with the prosecuting witness L. The offense is complete under our statute if the defendant assaulted her with the intent to have sexual intercourse with her forcibly and against her will.¹

¹ Nye, J., in *State v. Hughs*, Lorain Co. Com. Pleas.

To constitute an assault with intent to commit a rape, the man's purpose must be to use force, should it be necessary, to overcome the woman's will. Bishop's Cr. Law. It is not enough merely to solicit her, however urgently, to consent to a carnal connection. Ibid.

Sec. 2237. Same, continued—Force—Consent, etc.

The allegation of force, in the absence of previous consent, is proved by any competent evidence, showing that either the person of the woman was violated, and her resistance overcome by physical force or that her will was overcome by fear or by duress. In either case the crime would be complete, though she ceased all resistance before the act itself was actually consummated. Where a female submits to sexual intercourse through fear of personal violence, and to avoid the infliction of great personal injury upon herself, then such carnal intercourse would not be with such consent as would justify the act upon the part of the man accused.

To sustain a conviction upon an indictment for assault with intent to commit rape, the testimony must show not only that

the accused had a purpose at the time of the assault to have sexual intercourse with the prosecuting witness, but also that he intended to use whatever degree of force might be necessary to enable him to overcome her resistance, and accomplish his purpose.

You are instructed that if the defendant made an approach towards the prosecuting witness with intent to procure her consent to have sexual intercourse with her, and if she refused, he abandoned the purpose, such act would not constitute an assault with intent to commit a rape. But if you find from the evidence that the defendant made an assault upon the prosecuting witness with intent to use such physical force and threats as would overcome her will and compel her to submit to his desires to have sexual intercourse with him, such act would constitute an assault with intent to commit a rape.¹

¹ Nye, J., in *State v. Hughs*, Lorain Co. Com. Pleas.

For definition of attempt, see Bishop's Criminal Law, secs. 728, *et seq.*

If after an assault with intent to ravish, the woman who had resisted yields voluntarily, so that there is no rape, the offense of assault with intent to commit rape remains, 12 Ia. 66, 50 Ia. 189.

Sec. 2238. Same, continued—Declarations of prosecuting witness.

Testimony has been offered by the state and permitted to be given to you of the declarations made by L., the prosecuting witness, to her aunt, and to her mother soon after the alleged offense. In a case of this kind the declaration of the injured female made immediately or soon after the alleged offense, are competent testimony, provided the female has first been examined in court. They are competent not for the purpose of proving the commission of the offense, but as corroborative of or contradictory to her statement made in court.¹

¹ Nye, J., in *State v. Hughs*, Lorain Co. (Ohio) Com. Pleas.

This instruction is based on *Johnson v. State*, 17 Ohio, 593; *Laughlin v. State*, 18 Ohio, 99.

CHAPTER CXXXI.

REPLEVIN.

SEC.

2239. Short general instruction.

2240. Replevin of property of wife seized on execution against husband.

1. Statement of claims.
2. Ownership first to be determined.
3. Value of property.
4. Damages—If finding for plaintiff.
5. Damages—If finding for defendant.

2241. Conclusion of charge in replevin—(1) When bond given by plaintiff. (2) And when bond given by defendant.

2242. Replevin of annual products of the earth.

2243. Growing fruit—Whether personally under any circumstances.

2244. Replevin of property by vendor when purchaser insolvent and did not intend to pay for them.

2245. Effect of mortgage given upon goods fraudulently bought.

2246. Chattel mortgagee may prosecute action for replevin, when mortgage attacked as fraudulent.

2246a. Replevin of hogs by wife from purchaser on execution against husband.

1. Statement of claims.
2. Burden of proof and weight of evidence—
Testimony and evidence

SEC.

distinguished — Credibility of witnesses—Ultimate facts.

3. Wife claiming stock on farm of husband must rebut presumption of ownership by husband arising from possession and apparent ownership —She must show that she has separate property, or receipt of money during coverture.

4. Wife entitled to increase of her stock though raised on husband's farm —Not subject to levy by creditor of husband.

5. Wife estopped by conduct from claiming ownership as against persons dealing with husband on faith of his apparent ownership.

6. Wife estopped by fraudulent purpose and conduct of husband to avoid execution against his property if she has knowledge and participates therein.

7. Creditor of husband must have knowledge of and rely upon apparent possession and ownership by husband.

8. Wife must act with diligence in asserting her rights when creditor of husband levies execution.

9. Alternative verdicts.

Sec. 2239. Short general instruction.

The plaintiff, having alleged that he has the right of property and of possession, or had that right on the date this suit was commenced, has the affirmative of the issue; and therefore the burden is upon the plaintiff to establish by a preponderance of the evidence that he is entitled to the right of property or of possession in the chattels described, and that the defendant at the time of the commencement of this action wrongfully detained the property from him.

By a preponderance of the evidence is meant the greater weight of the evidence. Therefore, before the plaintiff can recover the greater weight of the evidence must be on the affirmative—on the side of the affirmative of this proposition; that the plaintiff at the commencement of this action had the right of property or of possession in the chattels described, and that the defendant wrongfully withheld possession from him. If you find such a preponderance in favor of the plaintiff, it will be your duty to find for the plaintiff. But if you find that the evidence on the proposition is evenly balanced, or preponderates in favor of the defendant, it will be your duty to render a verdict for the defendant.

You will therefore determine from the evidence in this case who had the right of property at the beginning of this action, and of possession, or either. If you find that the plaintiff had the right of property and possession, or either, your verdict will be for him. But if you find that he neither had the right of property nor possession, your verdict will be for the defendant.

As I have heretofore said, if you find that the plaintiff was not entitled to the possession of the property in question, then it will be your duty to find that the right of possession was in the defendant; and if you find in favor of the plaintiff in the case, then you will determine if the right of property or possession was in the plaintiff at the commencement of the action, and you will also assess damages for the plaintiff. No damages having been proved, you will assess one cent as nominal damages.

If you find for the defendant you will find the right of possession in the defendant, and you will also find the value of the property, and also find the damages for the detention. No damages having been proved, you will find one cent as the damages. The value of the property has been testified to here, and is undisputed as \$——; so that you will insert that value in your verdict in case you find for the defendant, together with the one cent damages.¹

¹ Pennell v. Adams, Court of Com. Pleas, Franklin Co., O. Rogers, J.

Sec. 2240. Replevin of property of wife seized on execution against husband.

1. *Statement of claims.*
2. *Ownership first to be determined.*
3. *Value of property.*
4. *Damages—If finding for plaintiff.*
5. *Damages—If finding for defendant.*

1. *Statement of claims.* Gentlemen of the jury, this is an action in replevin. The plaintiff by this proceeding seeks to recover possession of certain property seized by the defendant under an execution issued at the instance of the defendant against her husband. She claims the right to the property upon the ground that she is the owner of the property. The claim of the defendant is that the property does not belong to the plaintiff.

2. *Ownership to be first determined.* Your first inquiry, therefore, will be as to the ownership of this property. If the plaintiff is the owner of this property then the defendant could not legally seize it upon execution to satisfy a claim against her husband, and you should find by your verdict that she is entitled to the possession of the property.

3. *Value of property.* If you find that the plaintiff is the owner of this property, you will next proceed to determine the value of the property. In so doing it will be your duty to determine from the evidence the market value of the property

as it stood at the time it was taken. The rule is, what was the market value of those goods at that time and place. That is, what it would have cost the plaintiff to have replaced them with other goods of the same kind and quality. The value may be arrived at by deducting from the market value of new goods a reasonable sum for the depreciation in value resulting from the wear and use of the goods. Upon this question certain witnesses have given their opinions as to its value. The purpose of this testimony is to aid you in arriving at a correct conclusion as to its values.

4. *Damages—If finding for plaintiff.* You will also, if you find for the plaintiff, fix the damages sustained by her by reason of the unlawful taking and detention of her property. In doing so, you may take into consideration the effect of the taking upon her business. This does not mean that you shall speculate upon the amount of profit which it might seem probable she could have realized from the conduct of her business, but you may allow such sum as in your judgment would be the reasonable value of the use of such property to the plaintiff in the business in which she was engaged for the period of time she has been deprived of its use by virtue of its taking by the defendant under the bond in this case.

If you find for the plaintiff, in fixing the value of the property taken, you will deduct from the total value of all the property taken the value of such portions of it as you find was returned to the original owner or owners upon the order of the plaintiff in this case, if you find as a matter of fact that any of the property was so returned.

If you find for the plaintiff you will assess the value of the property taken and the damages for its taking and detention separately.

5. *Damages—If finding for defendant.* If you find for the defendant, he will be entitled to recover the damages he has sustained by reason of the unlawful taking and detention of the property by the plaintiff in replevin from the officer. That is, you will allow him as damages such sum as in your judgment

will compensate him for the loss sustained by him in being deprived of the property for the time it was held by the officer, who took it under the writ of replevin from the officer who held it under the writ of execution; that is, for the time which intervened between the taking in replevin and the return to the officer under the counterbond.

If you find for the defendant he will be entitled to nominal damages for the unlawful seizure and whatever actual damages, if any, the evidence will show he has sustained. By nominal damages I mean one cent, or five cents or some trivial sum.

If you find for the defendant you need not assess the value of the property.¹

¹ Gordon v. Logan, Constable, etc., *et al.*, Com. Pleas Court, Franklin Co., O. Bigger, J.

Sec. 2241. Conclusion of charge in replevin.

1. *When bond given by plaintiff.*
2. *When bond given by defendant.*

1. *When bond given by plaintiff.* The plaintiff having given a bond in replevin for the property pursuant to statute, the property has been delivered to him. Hence, if the jury find that the plaintiff is the owner of said property (or has an interest therein) and is entitled to the possession thereof, the jury shall determine and assess adequate damages to the plaintiff for the illegal detention of said property. But, if the jury find for the defendant, the jury shall find whether the defendant had the right of property, or the right of possession only to said property, at the commencement of the suit; and if the jury find either the right of property or of possession in the defendant's favor, the jury shall assess the value of such property, or of his interest therein as the case may be, and shall also assess to the defendant such damages as they think are proper for the taking, detention, and injury to said property. (See G. C., sec. 12056.)

2. *When bond given by defendant.* In the replevin proceeding the defendant has given bond for the property, and the

said property has been returned to the defendant after it was replevined by the sheriff. Hence, if the jury find that the plaintiff is the owner of said property (or has an interest therein) and is entitled to the possession of said property, the jury shall find and assess the value of said property (or of plaintiff's interest therein) and shall also assess adequate damages to the plaintiff for the illegal detention of said property. But, if the jury find for the defendant, the jury shall also find whether the defendant had the right of property, or the right of possession only to said property, at the commencement of the suit, and if the jury find either in the defendant's favor, the jury shall assess to the defendant such damages as they think are proper for the taking, detention and injury to said property.

Sec. 2242. Replevin—Annual products of the earth.

Those products of the earth which are annual, and are raised by yearly manurance and labor, and essentially owe their annual existence to the cultivation by man, termed "emblemments" and sometimes "*fructus industriales*," while still annexed to the soil, are treated as chattels, with the usual incidents thereof and are subject to replevin.¹

¹ *Sparrow v. Pond*, 49 Minn. 412, 16 L. R. A. 103, 32 Am. St. 571.

Sec. 2243. Growing fruit—Whether personalty under any circumstances.

Crops of fruit growing on trees, whether regarded as *fructus naturales* [natural fruits] or *fructus industriales* [fruits of industry] are in general parts of the realty, and unless reserved go with the realty in its transfer.¹ If the purpose of planting is not permanent enhancement of the land itself, but merely to secure a single crop, which is to be the sole return for the labor expended, the product naturally falls under the head of emblemments, and is personal property.²

But by the acts and intention of an owner of land containing bearing fruit trees and growing fruit may be converted into

personalty, and be treated as such by parties in their contractual relations. Where, therefore, an entire crop of growing [oranges] is sold by the owner of the land and the purchaser has the right to take them from the trees, they may be regarded as personal chattels, and an unlawful detention of the possession may be adequately remedied by replevin.³

¹ *Simmons v. Williford*, 60 Fla. 359, 53 So. 452. Am. Ann. Cas. 1912, C. p. 735.

² *Sparrow v. Pond*, 49 Minn. 412, 16 L. R. A. 103, 32 Am. St. 571.

³ *Simmons v. Williford*, *supra*, and note for other cases. *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591 (Peaches); *State v. Fowler*, 88 Md. 601, 42 L. R. A. 849, 71 Am. St. 452 (Peaches); *Smock v. Smock*, 37 Mo. App. 56 (Apples, etc.); *Doty v. R. R. Co.*, 136 Mo. App. 254 (Apples). See 77 Cal. 239.

Sec. 2244. Replevin of property by vendor when vendee was insolvent and did not intend to pay for same.

The questions for your consideration and determination are:

1. Was plaintiff at the time of the commencement of this action the owner of, and entitled to the possession of the property described in the petition or any part thereof? 2. What was the value of said property at the time of the commencement of this action? 3. Did the defendant, II., assignee, unlawfully detain from plaintiff the possession of said property or any part of it? 4. If he did so unlawfully detain said property, how much, if anything, were the plaintiff's damages by reason of such unlawful detention?

In determining the questions in this case it is important for you to consider the financial condition of W. at the time of the giving of the order to the plaintiffs in this case, for the shipment of the goods and his financial condition at the time of the shipping and receipt of the goods. * * * His financial condition before and after the date of the orders and the shipment of the goods is not conclusive as to his financial condition at the time of giving the order before shipping the goods, but evidence upon that point may be considered for the purpose of determining his condition at the time of giving the order, and at the time of the shipping and the receipt of the goods.

If you find from the evidence that W. at the time of giving the order for the goods that were shipped and received on and after ———, 19—, had sufficient property to pay all his debts in full, then there would be no fraud in ordering or purchasing other goods. But if you find that he had not sufficient property to pay all of his debts in full, then it will be important for you to consider and determine whether he was able to pay his debts and liabilities as they matured or became payable. Again, was W. in such a financial condition as to be able to pay, or have a reasonable expectation that he could pay for the goods purchased of the plaintiffs on or after ———, 19—, when the bills therefor became due and payable?

You are instructed, as matter of law, that the intention on the part of the purchaser of goods not to pay for them, existing at the time of purchase and concealed from the vendor, is such fraud as will vitiate the contract.

But on the other hand, where no such fraudulent intent exists, the mere fact that the purchaser has knowledge that his debts exceed his assets, though the fact be unknown and undisclosed to the vendor, will not vitiate the purchase.¹

Therefore, a contract of purchase where the purchaser fails to disclose his known insolvency, whether it is fraudulent or not, depends on the intention of the purchaser, and whether that intention was to pay or not is a question of fact for the jury to determine. While it may be said that fraud must be proved, and will not be presumed, there is a presumption that every reasonable person anticipates and intends the ordinary and probable consequences of known causes and conditions. Hence, if the purchaser of goods has knowledge of his own insolvency, and of his inability to pay for them, his intention not to pay may be presumed. An insolvent purchaser without reasonable expectation of ability to pay may be presumed to intend not to pay.

In determining the question as to whether or not the said W. had a reasonable expectation of his ability to pay for the goods when they became due and payable, it would be proper for you

to consider whether a man of ordinary business ability, situated as he was, could have reasonably expected to meet the obligations as they became due. It would be proper for you to consider whether the said W. on and after ———, 19—, at the time of ordering and receiving said goods, honestly believed and expected, and from his financial condition had reasonable grounds for believing that he could pay for the bills as they became due and payable. The said W. was permitted to testify as to what his intentions were when he gave the order. This evidence was permitted to be given to you for your consideration in determining what his real intentions were, but it is not conclusive; you should consider it in connection with all the other evidence, and from it all say whether the said W. at the time he gave the order intended to pay for the goods, or had a reasonable expectation of being able to pay for them.²

¹ "A contract for the purchase of goods on credit, made with the intent on the part of the purchaser not to pay for them, is fraudulent; and if the purchaser has no reasonable expectation of being able to pay, it is equivalent to an intention not to pay. But where the purchaser intends to pay and has reasonable expectations of being able to do so, the contract is not fraudulent, although the purchaser knows himself to be insolvent and does not disclose it to the vendor, who is ignorant of the fact." *Talcott v. Henderson*, 31 O. S. 162; *Wilmot v. Lyon*, 49 O. S. 296.

² *Nye, J., in Childs, Groof & Co. v. Harvey Musser, Summit Co. Com. Pleas.*

Sec. 2245. Effect of mortgage given upon goods fraudulently bought.

Where a person fraudulently purchases goods and executes and delivers to a third person a chattel mortgage upon the property which he so acquires, the sole and only consideration of which mortgage is a debt then existing, and that no new consideration was paid at the time of the execution of said mortgage, such pre-existing debt is not such consideration as would constitute such mortgagee a *bona fide* purchaser of said goods. If the only consideration for the making of such mortgage was a pre-existing debt, then such mortgagee would acquire

no greater title and right in the property so procured by fraud than would a fraudulent purchaser.¹

¹ Modeled from charge given by Nye, J., in *Childs, Groof & Co. v. Musser*.

Sec. 2246. Chattel mortgagee may prosecute action for replevin—When mortgage attacked as fraudulent.

You are instructed that as matter of law "where a mortgagor of personal property by the terms of the mortgage retains the possession of the property until the condition is broken, but with the express stipulation that if the mortgagor should commit any waste or nuisance, or attempts to secrete or remove the property, the mortgagee should be authorized to take immediate possession thereof; and before the condition broken, executions were levied upon the property at the suit of other creditors of the mortgagor under which said officer was about to remove said property from the possession of the mortgagor and sell the same to pay said executions, the mortgagee might obtain replevin for the recovery of said personal property.'" Applying these principles to this case, if you find that the plaintiff loaned to the said B. the sum of \$——, and to secure the payment thereof the said B. executed and delivered to the plaintiff in good faith a chattel mortgage on the said property in order to secure said money, and that the said mortgage had been filed and refiled in accordance with the law, so as to create said mortgage a valid lien upon said property at the time of the commencement of this action; and you further find by the terms of said mortgage that said B. retained the possession of the property until condition broken, or until the debt became due, but with an express stipulation that if the said mortgagor committed any waste or any nuisance, or attempted to secrete or remove the property, the mortgagee, B., should be authorized to take immediate possession thereof; and before the said debt became due the defendant, E., as sheriff of said county, levied executions upon the said property at the suit of other creditors of the said B., under which the said defendant was about to

remove said property from the possession of said B., and proceed to sell the same and pay said executions, the said plaintiff, B., would have the right to maintain replevin for the recovery of said personal property.²

¹ Ashley v. Wright, 19 O. S. 291.

² Nye, J., in Beebe v. Ensign, Lorain Co. Com. Pleas.

Sec. 2246a. Replevin of hogs by wife from purchaser on execution against husband.

1. *Statement of claims.*
2. *Burden of proof and weight of evidence—Testimony and evidence distinguished—Credibility of witnesses—Ultimate facts.*
3. *Wife claiming stock on farm of husband must rebut presumption of ownership by husband arising from possession and apparent ownership—She must show that she has separate property, or receipt of money during coverture.*
4. *Wife entitled to increase of her stock though raised on husband's farm—Not subject to levy by creditor of husband.*
5. *Wife estopped by conduct from claiming ownership as against persons dealing with husband on faith of his apparent ownership.*
6. *Wife estopped by fraudulent purpose and conduct of husband to avoid execution against his property if she has knowledge and participates therein.*
7. *Creditor of husband must have knowledge of and rely upon apparent possession and ownership by husband.*
8. *Wife must act with diligence in asserting her rights when creditor of husband levies execution.*
9. *Alternative verdicts.*

1. *Statement of claims.* This is an action in replevin wherein the plaintiff seeks to recover possession of fourteen shoats, one white sow and one female hog. Plaintiff is the wife of O. S. R., the two living on a farm which was owned by the husband.

The claim is made by the plaintiff that she, as the wife, purchased two sows, and that the fourteen shoats are the increase thereof, and therefore the personal property of the plaintiff.

2. *Burden of proof and weight of evidence—Testimony and evidence distinguished—Credibility of witnesses—Ultimate facts.* The defendant enters a general denial to the plaintiff's petition; that is, he denies that she is the owner, and therefore the burden of proving that she is the owner and that she has not been estopped by her conduct is upon her. This she must do by the greater weight of the evidence. There is a difference, gentlemen, between testimony and evidence. A witness may take the witness stand and give testimony and you may not consider it as evidence at all, or you may consider it as evidence, just as you in your judgment feel it ought to be considered. The testimony has to be run through the sieve of your minds, as it were, before it can become evidence. It has to be weighed in the scales of credibility. You must consider whether the story is probable or improbable; whether it is consistent with reason and common sense as applied to the transaction; whether it appears that the testimony has been given frankly, openly and squarely, or whether it has been given otherwise. You are to consider all the things that appear in this case that ought to be considered in determining the credibility of the testimony that has been given. You do not have to believe what a witness states just because he may have stated it, but you may disbelieve it altogether if you consider that the witness is unworthy of belief; or you may believe a part and disbelieve other parts. You should consider the interest or motive, if there is any, which prompts a witness to testify, or you may consider the want of interest; whether or not a witness is disinterested and has no reason under all of the circumstances for telling anything but the truth. The truth is the most sacred thing that courts of justice have to deal with. There is not anything in a court of justice that is more shocking than an untruth. Therefore, gentlemen, while you are sitting in the jury box and acting under the solemn obligation that you have taken, you have a sacred

duty to perform, and you know nothing but your conscience, your oath and your duty.

The preponderance of the evidence which must be established by the plaintiff in order to make out her case is not weighed in mathematical scales; it does not consist of the greater number of persons who testified. A case may be substantiated according to the greater weight of the evidence if the jury so thinks by even the testimony of one witness, or two; there may be a dozen witnesses testify on one side, and two on the other, and the jury, considering all, may conclude that the weight of the evidence is on the side of the minority, or it may be on the side of the majority of witnesses. It is all a matter of opinion and judgment for the jury. So that the first important thing for you to do is to sift the testimony and find out what the evidence is. The evidence consists of the ultimate facts to which the law attaches legal doctrines and consequences. These ultimate facts are drawn from the testimony by the jury, and the court instructs the jury concerning any and all questions that may be made by the parties. One side will make a claim on one line, and another will make a different claim; and an inference may be drawn from the evidence by the jury, and the court may perceive that inferences may arise, and therefore must instruct you as to the law applicable to these various questions and inferences, leaving the matter entirely to your judgment and discretion as to what you shall deem proper.

You are the sole judges of the facts and the court in whatever it says in regard to the law does not undertake to express any opinion whatever, leaving the matter entirely to your judgment.

3. *Wife claiming stock on farm of husband must rebut presumption of ownership by husband arising from possession and apparent ownership—She must show that she has separate property, or receipt of money during coverture.* The claim is made in evidence that the plaintiff furnished the money with which the two hogs were purchased. The hogs were raised on the farm which belonged to the husband of the plaintiff and which was farmed by him. The fact of ownership being the sole question

for the jury to decide, the court will instruct you concerning the phases of the claims of ownership of the property asserted by the wife, so as to enable you to decide whether the plaintiff was or was not the owner.

A wife living with her husband may have and hold property separate and apart from him. But in a case like this where a husband owns a farm on which he is conducting the business of farming, on which he has stock and is raising stock and other chattel property, the wife can not inherently use and enjoy her property, such as stock, if she has any, as fully and separately after marriage, as before, so far as outward appearances go, because she must enjoy it in a different way, in union, as it were, with her husband. [*Walker v. Reamy*, 36 Pa. St. 410.]

A married woman may, however, own personal property as her own as separately and independently as if unmarried. But the nature of the possession and the conduct of the wife and husband may be such as to operate against the wife so far as may concern the creditors or persons dealing with the husband.

The rule of law in such case, therefore is, that so far as regards creditors, all the money and personal property of the family are presumed to belong to the husband until the contrary is shown. [*Rhoads v. Gordon*, 38 O. S. 277.]

So the rule is that where a married woman claims property in opposition to her husband's creditors, which she claims to have been purchased by her since and during marriage, the burden is upon her to establish by the greater weight of evidence, that she either had other separate means or property apart from her husband, or that she has received money or other property by either will, descent, conveyance or otherwise and that she invested it in the property claimed. [*Walker v. Reamy*, 36 O. S. 410; *Rhoads v. Gordon*, 38 O. S. 277.]

The obligation, therefore, rests upon plaintiff not only to rebut this presumption or *prima facie* ownership of the hogs, but to establish the fact of her ownership of the same by the greater weight of the evidence.

The plaintiff and her husband have given evidence concerning the alleged receipt of money from her father and from his

estate at different times. The jury will weigh and consider this testimony, consider the time of its alleged receipt, the probability of its retention by plaintiff, or any part thereof, from the time of its receipt until the time the hogs were purchased; you should consider the credibility of the witnesses in this connection, their demeanor while on the witness stand, whether they gave a satisfactory account of the alleged receipt of the money and its retention and disposition. You should consider also all their business dealings between plaintiff and her husband concerning money transactions and the alleged borrowing of money by her husband, or any other transactions relating to money. You should also consider the manner in which the husband dealt with the title to his farm, his admitted object and purpose in not keeping the title thereto in his own name, and the knowledge of the wife of this fact. And, if on full consideration of this question of alleged ownership of the two sows, you conclude that the presumption of ownership in the husband is not overcome and that the claim of ownership on the part of the plaintiff is not established by the greater weight of the evidence, then that will end your consideration of the case and your verdict should be for the defendant.

5. *Wife entitled to increase of her stock, though raised on husband's farm—Not subject to levy by creditor of husband.* But if you find that plaintiff was the owner of the two hogs, then you will proceed to the consideration of the remaining questions in the case. If the plaintiff was the owner of the two hogs, then the increase therefrom, the fourteen shoats, became in law a part of her separate property, even though the same were kept on her husband's farm, and though her husband may assist or take part in the raising thereof.

If a wife owns personal property separate and apart from her husband, a creditor has no right to levy execution thereon for the debt of the husband. Even though a wife buys personal property for the benefit of herself and her husband, and to become part of the business of the conduct and management of the farm, she may by her conduct in respect to the use and pos-

session of the same, become estopped from claiming ownership as against a person who may have been dealing with her husband and in reliance upon the apparent possession of the same by her husband and his presumed ownership because of such apparent possession and control.

6. *Wife estopped by conduct from claiming ownership as against persons dealing with husband on faith of his apparent ownership.* If a husband, or the husband of plaintiff in the conduct and management of a farm has thereon stock purchased by the wife which is in his possession and control, and which is being raised and fed on his farm, in the absence of conduct on the part of the wife in treating the same as part of her own separate property; or if she willingly allowed the hogs as her separate property to become mixed and mingled with the stock and other chattel property of her husband, or to be and remain in his apparent control and possession as if his own, so as to warrant a person dealing with her husband in believing and relying upon the possession of the hogs as his own, and if the wife made declarations to the person dealing with her husband that she did not own any of the property in her husband's possession, and such person, the creditor, that is S. in this case, did rely upon such possession and did extend credit to him in reliance upon such possession, in such case the wife would be estopped from claiming ownership.

If a wife permits her husband to have and possess her separate property as his own, if plaintiff permitted her husband to have possession of the hogs and raise them on his farm as if his own, and to hold them out to the world as if he was the owner thereof, she will be estopped to claim them against an execution creditor of her husband, whose claims arose while the property was so held and who relied upon such apparent ownership and title in her husband. (21 Cyc. 1399, n. 79.) If the creditor did not rely upon such apparent ownership of title, then, of course, the wife could hold them. It is essential, to estop her, that the person must know of this situation and must have relied upon it before the wife can be estopped.

6. *Wife estopped by fraudulent purpose and conduct of husband to avoid execution against his property if she has knowledge and participates therein.* And again, if the wife has knowledge of a fraudulent purpose of her husband in taking and holding the farm on which they live, and which he in fact owns, in the name of another to avoid its seizure by an execution creditor, the law will charge her with the same consequences arising from such fraudulent purpose as it will her husband, if she in any wise undertakes to aid him in his fraudulent purpose in any wise in respect to any of his property, personal as well as real, and she will be estopped from asserting a claim to any personal property as to which she may assert a claim of ownership of the circumstances are such as to justify the inference in the minds of the jury that she is attempting to assert a claim to defeat a creditor of her husband.

7. *Creditor of husband must have knowledge of and rely upon apparent possession and ownership by husband.* The court has given you the various rules of law attaching to the conduct of the plaintiff in connection with the purchase of the property and its care and possession as the jury may find it to be. If by its application to the evidence—that is, if by the application of the law to the evidence in this case you find that though plaintiff may have bought and paid for the hogs, but that by reason of her conduct concerning the same, that because of the manner in which the same were kept and maintained, that S. dealt with her husband in reliance upon the apparent possession and right to the chattel property on the farm, and that he believed that her husband owned the property, and if the wife, the plaintiff, had knowledge of a fraudulent purpose on the part of the husband in keeping the title to the farm in the name of another person, she is chargeable in law with knowledge that such conduct on his part will tend to deceive her husband's creditors, and with such knowledge she will be estopped from claiming ownership to the personal property by reason of her conduct.

8. *Wife must act with diligence in asserting her rights when creditor of husband levies execution.* If under such circum-

stances a creditor of her husband takes judgment against him and execution is levied upon personal property, a part of which she claimed, under such circumstances good faith and fair dealing requires that she shall act with reasonable diligence in the assertion of her rights in order that she may protect innocent persons who may become bidders at the sale as well as the execution creditor.

The law charges every person with knowledge of the law; because the ordinary person may not know his legal rights, it is incumbent upon him or her to take proper steps to learn and know what they are.

The statutes of this state describe a convenient, precise and exact remedy for the protection of the rights of a person who claims ownership of personal property upon which execution is levied. It is provided that when a constable levies on property which is claimed by a person other than by the one against whom the execution issued—that is, claimed by someone other than the husband in this case—the one who claims the title,—the wife in this case,—shall give three days notice in writing to the plaintiff of his or her claim, which shall be tried before some justice at least one year prior to the time appointed for the sale. Sec. 10371.

If the justice finds that the property levied on belongs to the one claiming it, that is, to the wife, and not to the person against whom the execution runs—that is, the husband—then that disposes of the case and protects the rights of all interested persons as well as the one who claims he does own the property. See. 10372.

In other words, plaintiff could within a few days after levy have had a trial of the right of property as between herself and S., a judgment creditor, so that in such case neither the constable nor any purchaser would suffer any loss.

9. *Alternative verdicts.* The jury may consider her conduct in failing to take steps to recover the property from the constable in pursuance of the statutory remedy mentioned, together with all of her acts and conduct, and if on the whole, you find

that in good conscience she is estopped from claiming the property, your verdict should be for the defendant.

If, however, you find that the property belonged to the plaintiff at the time of the levy and that she is not estopped from claiming title thereto, you will proceed to award her such damages according to the reasonable value of the property at the time of the levy of the execution.

Under the statutes of replevin this action proceeds as one for damages, as the hogs are not now in existence, and the jury will therefore award plaintiff such damages as will fully compensate her for the property. But, if you find that plaintiff did not have the title, or having the title that she was estopped by her conduct as against the judgment creditor and the defendant, as purchaser on execution sale, your verdict should be for the defendant.¹

¹ Ross v. Nedds, Franklin County, Com. Pl., Kinkead, J.

CHAPTER CXXXII.

ROBBERY.

SEC.	SEC.
2247. Instructions in charge of robbery.	2248. Taking property in presence or under the immediate control of another.
1. The charge in the indictment.	2249. Conspiracy to rob.
2. Burden—Degree of proof—Etc.	2250. Conspiracy in commission of robbery.
3. The statute.	2251. Character of evidence essential to prove conspiracy.
4. Force and violence.	2252. Liability independent of conspiracy.
5. Intent.	2253. Assault with intent to rob—
6. Anything of value.	Violence concomitant with the taking.
7. Possession of property in defendant.	
8. Charge includes assault and battery.	

Sec. 2247. Instructions in charge of robbery.

1. *The charge in the indictment.*
2. *Burden—Degree of proof, etc.*
3. *The statute.*
4. *Property taken in two ways.*
5. *Force and violence.*
6. *Intent.*
7. *Anything of value.*
8. *Possession of property in defendant.*
9. *Charge includes assault and battery.*

1. *The charge in the indictment.* The indictment charges that the defendant on the ———, in the county of ——— and state of Ohio, unlawfully and forcibly did make an assault upon one ———, and did unlawfully, forcibly, by violence and putting him, the said ———, in fear, take from his person, and against his will, certain property, to-wit: [describe it], and

that defendant did steal, take and carry away, with intent to steal the same.

2. *Burden—Degree of proof.* To warrant the jury in finding defendant guilty you must find beyond a reasonable doubt the existence of the essential elements necessary to constitute the crime of robbery, and the burden is upon the state to prove the same, etc., etc.

3. *The statute.* The statute with reference to this crime provides as follows: “Whoever, by *force and violence*, or by putting in fear, steals and takes from another, anything of value, is guilty of robbery.” [Code, sec. 1232.]

4. *Property taken in two ways.* The jury is instructed that the crime may be committed in either of two ways. 1. It may be done by taking anything of value from the person of another, by *force and violence*; or, 2. the property may be taken from the person of another by putting him in fear.

5. *Force and violence.* To constitute the crime of robbery by force and violence it must appear that defendant used force and violence in taking the property from the person of —— at the time of the taking, or concomitant therewith.

The force and violence used in taking the property from the person of another may be *actual* or *constructive*. That is, the power of the owner to retain possession of his property may be overcome by actual violence physically applied, or by putting him in such fear as to overpower his will.

6. *Intent.* The taking of the property, to constitute robbery, must have been taken with *felonious intent*; that is, it must be made to appear that defendant took the property as charged from the person of —— with the intent to unlawfully convert it, or to appropriate it to his own use, and to deprive him of his property.

7. *Anything of value.* The property, to be within the meaning of the statute as being *anything of value*, must be money or personal goods and chattels. It is sufficient if it is of any value; it does not matter whether it is of much or of little value.

8. *Possession of property in defendant.* If the jury find that the property, to-wit: ———, which was feloniously taken from the person of ———, as charged in the indictment, was found in the possession of such property; and if defendant has not given a satisfactory explanation of his possession of the same, you may consider such fact of his possession of the property in connection with all the other facts and circumstances, as shown by the evidence, for whatever worth or bearing it may have in your judgment on the question of his guilt or innocence. [*Methard v. State*, 19 O. S. 363, 3 C. C. 551, 17 C. C. 486.] See charge, *ante*, sec. 1856.

9. *Charge includes assault and battery.* The offense of robbery charged in the indictment, includes also the crime of assault and battery. Hence, if the jury finds that the defendant is not guilty of the crime of robbery, but is guilty of assault and battery, then you may return a verdict for assault and battery.

An assault is any unlawful physical force, creating a reasonable apprehension of immediate physical injury to a person; an intentional attempt by force to do an injury to another. A battery is committed when the violence is actually used upon the person.

The slightest touching of another in an angry, rude or insolent manner is battery.

Sec. 2248. Taking property in presence or under the immediate control of another.

The jury are instructed that “in order to consummate the offense (of robbery) it is not necessary that the property should be actually taken from the person of R. M., the individual named in the indictment. It is enough if the property was in his presence and under his immediate control, and he was put in fear by the defendant, and whilst the property was so in his presence, and under his immediate control; and he laboring under such fear, the property was taken by the defendant.”¹

¹ *Turner v. State*, 1 O. S. 424 and cases cited; Bishop’s Cr. Law, sec. 975; Wharton’s Cr. Law, sec. 1696.

Sec. 2249. Conspiracy to rob

Now, to apply these principles of law to the present case. If you find from the evidence that the defendant here on trial and others combined and agreed among themselves to commit an assault upon the person of H. N. with the intent to rob him, and in pursuance of that combination or agreement this defendant was present, aiding, abetting, or encouraging said assault, and that this defendant, or such other persons as have made such combination or agreement, carried out the purpose of said combination and agreement and committed the offense agreed upon the person of said H. N., all who were present aiding, abetting, and encouraging said unlawful purpose would be guilty of the act there done.

Again, if you find from the evidence in this case that the defendant here on trial and one or more other persons combined or agreed among themselves to commit an assault upon and rob H. N., and that, in pursuance of said combination or agreement, said persons did assault and rob H. N. as charged in the indictment of all such persons who were present, aiding, abetting, and encouraging, would be guilty of the offense thus agreed upon and committed, and this defendant was a member of said agreement and combination, and was present, aiding, abetting, and encouraging in said robbery, he would be guilty of the crime there committed. It is not necessary that the defendant on trial, himself actually assaulted and robbed H. N. (if you find that he was assaulted and robbed), because if you find that the defendant was a member of the combination and agreement, that some other person or persons did themselves in fact assault and rob H. N., in pursuance of such agreement or combination for that purpose, and the defendant here was present, aiding, abetting, and encouraging the act, then he would be guilty.¹

¹ Nye, J., in *State v. Dedrick*, Lorain Co. Com. Pleas.

Sec. 2250. Conspiracy in the commission of robbery.

It is claimed by the state that the defendant, C. D., here on trial, and others united in the common purpose of robbing H. N.,

and that said purpose was carried into execution. Such a common purpose is in law called a conspiracy.

This defendant denies that he had any such purpose or intent, and denies that he, or he with others, assaulted H. N. with the intention of robbing him, or with any other intention, and denies that he, or he with others, took any money, goods, or property from the said H. N. Now you are instructed as a matter of law that: "When several persons unite to accomplish a particular object, whether they collectedly put each his individual hand to the work, or one doing it, the others lent the aid of their wills, not in the way of mere passive desire, but of active co-operation, the persons thus uniting are all and several responsible for what is done."¹

¹ Bishop's Crim. Law: "If several, combining both in intent and in act, commit a crime jointly, each is guilty the same as if he had done the whole crime." 1 Bishop's Crim. Law, sec. 630, and, "all who by their presence countenance, or encourage in the commission of the crime, are liable as principal actors." 1 Bishop's Crim. Law, sec. 632. But, "if two or more persons are lawfully together and any one of them commits a crime without the concurrence of the others, the rest are not thereby involved in the guilt." 1 Bishop's Cr. Law, 634. And, "if two or more persons are unlawfully together, and one of them commits a crime without the concurrence of the others, the rest are not thereby guilty." "Also if several persons are by concurrent understanding in the actual perpetration of the crime, and one of them, of his sole volition, and not in pursuance of the main purpose, does another criminal thing which is in no way connected with what was mutually contemplated, he alone is liable."

Sec. 2251. Character of evidence essential to prove conspiracy.

The combination or conspiracy may be shown either by direct testimony or by circumstances and conduct.

Evidence in the proof of the conspiracy will generally, from the nature of the case, be circumstantial.¹ Though common design is the essence of the charge, it is not necessary to prove that the defendant "and others" came together and actually agreed in terms to have that design and to pursue it by common means. If it is proved that the defendant "and others" pursued by their acts the same object, by the same means, so as to

complete it with a view of the attainment of the same object, the jury would consider such evidence to determine whether all were engaged in the conspiracy to effect that object.

But, if the defendant was present when H. N. was assaulted and robbed (if such you find to be a fact), and the offense was committed without any agreement or combination with him, and without his knowledge and consent, then he would not be guilty, unless he take some part in the assault and robbery. The mere presence of the defendant when the assault and robbery was committed upon H. N. would not make him guilty.

If you find from the evidence that the defendant here on trial and others were at the place of the alleged offense, and that the defendant and others with whom he was associated were there engaged in a common purpose of robbing H. N., and that, in pursuance of said engagement, the said H. N. was in fact robbed, then all who were there, aiding, abetting, and encouraging in said common purpose would be guilty of the offense there committed in pursuance of said common purpose.²

¹ 3 Greenleaf's Ev., sec. 93.

² Nye, J., in *State v. Dedrick*, Lorain Com. Pleas.

Sec. 2252. Liability independent of conspiracy.

But, gentlemen of the jury, independent of any combination or agreement, if you find from the evidence that has been given to you that the defendant made an assault on H. N., and took from him by force or violence, or by putting in fear, as has been heretofore explained to you, any money of any value, then he would be guilty for his own acts. Every person is responsible for his own acts, and if there was no agreement between the defendant and any other person, or persons, he would be individually responsible for all that he did on that day, if you can find that he did anything.

Sec. 2253. Assault with intent to rob—Violence concomitant with the taking.

The jury are instructed that the crime of robbery can not be committed unless there has been some force or violence, or

putting the person alleged to have been robbed in fear. The offense may be committed by putting in fear without any force or violence, or without putting in fear, but by force or violence. There being no putting in fear, violence is then an essential ingredient in the crime. Violence, in order to constitute an assault with an intent to rob, must be concomitant with, and not subsequent to, the attempt to take the property. If you find that the accused had abandoned his attempt to take the property, and there was a struggle in order to avoid arrest, however violent this struggle may have been, it did not characterize the act as an attempt to rob.¹

¹ *Hanson v. State*, 43 O. S. 376.

CHAPTER CXXXIII.

SALES—WARRANTY.

SEC.

2254. Sale, when complete.
2255. What constitutes valid sale—
Fraudulent contract.
2256. Sale on credit.
2257. Representation as to financial condition invalidating—Insolvency of buyer intention—Persons presumed to anticipate probable consequences of known conditions.
2258. What language constitutes warranty in sales.
2259. Buyer having opportunity to inspect—Caveat emptor—Rule applies unless express or implied warranty.
2260. Recoupment of damages where vendee has used property under warranty as to quality.
2261. Notice of rescission, when necessary.
2262. Sale through mistake may be rescinded in action for purchase price when.
2263. Whether delivery to mill a sale.

SEC.

2264. Action to recover purchase price on sale—When article unsuitable for use—Must be rescission and tender back.
2265. Acceptance and continued use of thing sold after knowledge that it will not work.
2266. Fraud and deceit in sale of property—Parties dealing on an equality.
2267. Same continued—Opportunity of inspection.
2268. Same continued—What commendations may be made—Dealers talk.
2269. Expression of opinion as to amount, value, and quality.
2270. Breach of warranty in sale of horse.
1. Express warranty defined.
 2. Statement of opinion.
 3. Opportunity for inspection and examination.
 4. Measure of damages.

Sec. 2254. Sale—When complete.

“All that is necessary to pass property is that the buyer and seller agree. If one who has a long course of dealing with another have a correspondence in regard to certain specific property, nearer to the purchaser than to the seller, and more properly, by reason of their business relations, in the control of the

purchaser, and they agree, one to buy and the other to sell, the sale is complete just as soon as they agree, and the seller charges the buyer, and the buyer credits their respective books with the price of the property.”¹

¹ *Robinson v. N. H. L.*, 6 Neb. 328, 332.

Sec. 2255. What constitutes valid sale—Fraudulent contract.

The rights of the parties in this case depend upon whether or not there was a valid consummated sale by K. to H.; a sale is not consummated simply by transmitting the possession of the goods from the seller to the purchaser; there must have been another condition, namely, title of goods; the right of the property therein must also have passed from the seller to the buyer; unless this ownership of the goods, as well as the possession thereof, passed from the vendor to the vendee, there was no consummated sale and the ownership remains in the vendor. Whether or not the title to the right of the property, the ownership of the goods passed, depends upon the existence of a legal valid contract of sale made between the vendor and the vendee; for although possession may be transferred by exchange from one to another, yet title and ownership changes only by the operation of the law, through the medium of the valid contract; a valid contract being an avenue through which ownership can pass.

An invalid or fraudulent contract will not be recognized by the law as of any potency, or as a means to carry the right of ownership from one to another. * * * Where a sale is made for cash, the goods being delivered simultaneously with the payment of the price, both seller and buyer in that instance has received what he bargained for, the one giving the goods and the other receiving their equivalent in cash, so that each has all the benefit which can accrue to him from sale, and each has performed every obligation which his duty under the sale requires; the contract is complete and valid, and title to possession has passed.¹

¹ *Wright, J., in Knight & Co. v. Hopkins, Hamilton Co. Com. Pleas. Talcott v. Henderson*, 30 O. S. 162.

Sec. 2256. Sale on credit.

But in the case of sales made upon credit the conditions are different; there no cash passes from buyer to seller, although possession of the goods is given; the seller relies not on the equivalent in value already received, but trusts to obtain it in the future. This trust is based upon and grows out of those things which influence the mind of the seller at the time he parted with his goods; and if the statements or conduct of the buyer were things which influenced the mind of the seller in giving the credit, then his statements and conduct must be fair and true, because if they are false and fraudulent, and the seller has relied upon that which does not exist, there can be in that case no mutual understanding or contract which can serve the principles of transferring title and ownership; there is no valid contract of sale, the ownership remains still in the original proprietor and he may take the goods back, even though the other has possession thereof. * * *

In sales upon credit the mere fact that the seller has gotten a bad bargain, or is mistaken in what he thought was the buyer's financial responsibility does not at all entitle him to rescind the sale. If the vendor sells on credit and merely takes his chances then he has bargained for nothing which he has not gotten, and the sale stands, although the buyer never pays. It is only where the seller is misled by the buyer, and is induced to give credit by a false belief which is occasioned by the acts and representations of the buyer that he can rescind the sale and recover back his goods. * * * If the vendor merely takes his chances and is not influenced by the conduct or statements of the vendee, then the sale is valid, and he has no right to replevin the goods; but on the contrary, if credit was given on account of misrepresentations made by the vendee, and it turns out that all such representations were the cause of inducing the sale, and they were false and fraudulent, then the sale is invalid and the title does not pass, and they may recover back their goods.¹

¹ Wrigat, J., in *Knight & Co. v. Hopkins*, Hamilton Co. Com. Pleas. *Talcott v. Henderson*, 30 O. S. 162.

Sec. 2257. Representations as to financial condition invalidating—Insolvency of buyer—Intention—Persons presumed to anticipate probable consequences of known conditions.

Where a buyer although he makes no statements whatever as to his financial condition, and is not called upon to make any such statement, but intends at the time of making such purchase not to pay for the goods, this will invalidate the sale. Such conduct amounts to a misrepresentation, because when a man goes to buy, a mere offer or attempt to buy carries with it the inference that the proposed buyer intends to pay for what he is buying whether he expressly promises or not; but if, in fact, he intends not to pay, then his conduct in offering to buy, which indicates an intention to pay, is false, and inasmuch as the seller would not have sold had he known that the buyer did not intend to pay, he has been influenced by a false belief induced by the buyer, the buyer's conduct is fraudulent, and the sale is void.

But in this connection the fact that the buyer is insolvent and does not disclose his insolvency to the seller does not necessarily prove that he intended not to pay when he purchased the goods. What his intention was is for you to determine from all the evidence; intention is the condition of the mind, intangible, invisible, and consequently incapable of direct, positive proof, unless there appears from some outward expressions, but must generally be arrived at by a consideration of the situation, surroundings, and circumstances in which the person whose intention is in question is found. And as a rule of proof in such cases, found by experience to be just and wise, the law presumes that reasonable persons anticipate the ordinary and probable consequences of known conditions and consequences; hence, if a purchaser of goods has knowledge of his own insolvency, and knows that he will be unable to pay for the goods, his intention not to pay should be presumed. But if the purchaser does, in fact, intend to pay, and has reasonable expectations to pay, then the presumption does not arise, and the sale is valid.

even though he be insolvent and knows it and does not disclose it. Fraud is never presumed, and the burden of proving its existence is always upon him who alleges it.¹

¹ Wright, J., in *King & Co., v. Hopkins*, assignee, *Hamilton Co. Com. Pleas. Fraud. Talcott v. Henderson*, 30 O. S. 162.

Sec. 2258. What language constitutes warranty in sales.

“If during the negotiation for the sale of the horse, the defendant made an assertion of soundness, which assertion was intended to cause the sale of the horse, and was operative or effectual in causing such sale, then such assertion would constitute a warranty. But a mere expression of an opinion is not enough to constitute a warranty.”¹

(a) Implied warranty that goods are fit for purpose sold.

The jury are instructed that where a person sells goods for a specific purpose, with knowledge that the purchaser is getting them for that special purpose, such purchaser has a right to expect that they will answer that purpose, and when the vendor so sells them, with full knowledge of what use the vendee expects to make of them, the law is that the vendor impliedly undertakes with and warrants to the purchaser that the goods are fit for the use intended, and if it turns out that they are not fit for such use, there is a breach of warranty.²

¹ From *Little v. Woodworth*, 8 Neb. 283. The court held in this case that no particular form or set of words are necessary to constitute a warranty, but that any form of words will be sufficient.

² *Byers v. Chapin*, 28 O. S. 300. See *L. R. 2 Q. B. D. 162*; *Wilson v. Lawrence*, 139 Mass. 321. The particular purpose must be made known by the vendee if he desires to place upon the seller the responsibilities flowing from an implied warranty. *Hight v. Bacon*, 126 Mass. 13. If the buyer relies upon himself there is no warranty. *Mattoon v. Rice*, 102 Mass. 236.

Sec. 2259. Buyer having opportunity to inspect—Caveat emptor—Rule applies unless express or implied warranty.

The jury are instructed as matter of law that in sales of personal property, in the absence of an express warranty, where

the buyer has an opportunity to inspect the goods or article, and the seller is guilty of no fraud, and is not the manufacturer or grower of the article he sells, the maxim of *caveat emptor* applies.¹ By that we mean that the purchaser must take care that there are no defects. The purchaser buys at his own risk. This he does unless, as stated, there are present any of the facts just stated, an express warranty, or unless the circumstances of the case are such that the law will imply a warranty.²

An implied warranty is one which the law implies from the circumstances of the case, and is really founded upon the presumed intention of the parties. The implication which the law draws from what must obviously have been the intention of the parties, with the object of giving efficacy to the transaction and preventing a failure of consideration as can not have been within the contemplation of either side.

If the jury finds from a preponderance of the evidence that the defendants engaged, for a reasonable or valid consideration, to build them three boilers to run the engines for their rolling-mill, and agreed to build them, they, the defendants, impliedly agreed that the boilers should be built of good materials and good workmanship; and should be free from all such defects of material and workmanship, whether such defects are latent or otherwise, as would render them unfit for the usual purposes of such boilers.³

¹ *Barnard v. Kellogg*, 10 Wall. 388.

² *Story on Sales* (3d ed.), sec. 348, 20 Johns, 196.

³ *Rodgers v. Niles*, 11 O. S. 48.

Sec. 2260. Recoupment of damages where vendee has used property under warranty as to quality.

The jury are instructed that if you find that there was a breach of warranty as to quality of the goods under the instructions given you on that point, the defendant may do one of two things. He may entirely rescind the contract of sale, return the goods, or offer to return them, or retain the goods without offering to return them, and in a suit for the price

recover any damages he may have sustained by reason of the breach of warranty. He may recover damages for the difference in value of the goods actually received by him and the value of goods had they been of the quality and grade represented and warranted to be, as well as any trouble and expense incurred by reason thereof.¹

¹ *Dayton v. Hoogland*, 39 O. S. 671, 82 and cases; see 26 O. S. 537, 38.

Tender of an animal back is not necessary to recover damages, that is, difference in value. *Beresford v. McCune*, 1 C. S. C. R. 50.

If there is a false warranty the vendee may rescind the contract for the fraud, and restore the goods within a reasonable time. *Nelson v. Martin*, 105 Pa. St. 229; *Freyman v. Knecht*, 78 Pa. St. 144; *Sparling v. Marks*, 86 Ill. 125.

Or the vendee may retain the goods and rely on the fraud in defense. *Cavender v. Roberson*, 33 Kan. 626; *Carey v. Guillow*, 105 Mass. 18; *Herfort v. Cramer*, 7 Colo. 483, 489.

Sec. 2261. Notice of rescission, when necessary.

The jury are instructed that the law requires a person who desires to rescind a sale on account of a breach claimed as against the other contracting party, good faith requires that he should give notice of his claim or purpose to rescind whenever his failure so to do would injure the defaulting party; and that if he willfully keeps silent when he ought to speak he will be regarded as waiving such default, or as electing not to rescind.¹

¹ *Leeds v. Simpson*, 16 O. S. 321.

Sec. 2262. Sale through mistake may be rescinded in action for purchase price, when.

The jury are instructed that a contract of sale made under a mistake as to a material fact may be rescinded by the party sought to be charged as the vendee, in an action by the vendor to recover the purchase price from the vendee. The mere fact that the vendee has given a note for the purchase price of the goods sold does not amount to a waiver of such mistake or prevent him from insisting upon the mistake as a defense, unless he had knowledge thereof, or ought to have known of it. It is

very clear that a defendant can claim no benefit of a mistake as to what he ought to have known, or could, by reasonable diligence, have found out. If the defendant, at the time of the giving of the note, knew of that fact, or is justly chargeable, under all the circumstances of the case, with a want of reasonable diligence to ascertain it, and to guard against the alleged mistaken belief, the defense on the ground of mistake fails. In determining this matter of the want of reasonable diligence you may look to and consider what the plaintiff said and insisted on in regard to the barrels sold, and you may well consider whether if the plaintiffs themselves entertained the mistaken belief that the barrels were not suitable for oil barrels, if properly glued, and asserted it as a fact, any want of reasonable diligence can justly be imputed to the defendant for having the same mistaken belief.

If the defendant acted solely upon the statements or representations made by the vendor, and the defendant did not have any opportunity to see and inspect the barrels, under such circumstances they can not be charged with want of diligence.¹

¹ Byers v. Chapin, 28 O. S. 300.

There is no sale if there has been a material mistake as to their identity. Hawley v. Harris, 112 Mass. 32. There is no meeting of minds to form a contract if there has been a mistake. 11 Pet. 71; 20 Pick. 139. Nor is there a sale if there be a material misunderstanding as to the price. 40 Cal. 459; 62 Wis. 584; 44 Kan. 277.

Sec. 2263. Whether delivery of wheat to mill a sale.

If the evidence shows that it was understood between W., the plaintiff, and J., the miller, that the wheat in controversy was put in the mill to be kept until such time as W. chose to demand redelivery, and that J. agreed to redeliver it to W. upon such demand, the transaction was not a sale of the wheat to J., but the wheat remained the property of W.¹

(a) *Effect of mixing with other wheat upon transaction.*

“And this character of the transaction is not lost either, even though the custom of the country in reference to which the wheat was received warranted the mixing of it with the wheat

of others in the mill, or because it should appear that by the consent of the plaintiff and the miller the wheat was mixed with other wheat in the mill belonging to the miller himself."

1. *With understanding that miller was to ship or use same on his own account, etc.* "If the jury find that the plaintiff did deposit wheat with J. D. J., at his mill, yet if the jury find that at the time J. received the wheat it was to be and was mixed in a common mass with other wheat in the mill, and with the knowledge or understanding that J. was to retain and use or ship the same, for sale on his own account, at his pleasure, and on demand of the plaintiff was either to pay the market price thereof in money or redeliver the wheat, or other wheat in place of it to the plaintiff, the title of the wheat passed to J., and the plaintiff can not recover in this action."²

2. *Mixed with consent of owner.* That if the proof shows that the plaintiff's wheat, either with or without his consent, was mixed in a common mass with other wheat in the mill belonging to the miller (or to the miller and other persons who had deposited wheat in the mill), the plaintiff acquired thereby a property in the common mass of wheat equal in quantity to that he had put in the mill."³

(b) *Option to demand equal number of bushels of common mass.*

"If the jury find that it was the understanding between the miller and the plaintiff that the plaintiff had the option to demand and receive the return of his own wheat or an equal number of bushels of wheat out of the common stock in the mill belonging to the miller and the depositors, including plaintiff's, or to then elect to sell, then the miller, as to the plaintiff's wheat, was a bailee, and was not the owner."

"If plaintiff delivered wheat at J.'s mill, and the same was mingled with wheat of the miller or other depositors, he, the plaintiff, did not thereby lose his property, but he retained a property in so many bushels of the common mass in the mill as he had put in, notwithstanding that it may have been understood between the miller and the plaintiff that the plaintiff's

wheat should be mingled with the miller's wheat and the wheat of other depositors."

"If the understanding between the miller and the plaintiff provides that J. was to deliver to plaintiff out of the common mass in the mill the number of bushels which he put in the common mass in the mill, and his proportion was still in the common mass, the plaintiff is entitled to a verdict."¹

¹ Chase v. Washburn, 1 O. S. 244.

² This was given by request. Chase v. Washburn, 1 O. S. 244, 252; 117 Pa. St. 604; 75 Ia. 267.

³ James v. Plank, 48 O. S. 255. It was a bailment, so that the plaintiff acquired, as in charge stated, property in common mass. *Id.* "Where the identical goods delivered are to be restored in the same or modified form (as where wheat is to be restored as flour), the property in the goods is not changed; the transaction is a bailment." 150 U. S. 312, 329; 7 N. Y. 433; 8 Allen, 182.

⁴ Stillwell, J., in Geo. W. Hall v. John Watkins, S. C., No. 1707.

"Where grain is deposited with a warehouseman, with an understanding that it will be mingled with other similar grain of other parties, and that its equivalent from the common mass will be returned in the same or an altered form, the depositor is a tenant in common *pro rata* with all the other like depositors, and the warehouseman is their common bailee. This is merely the case of an intermixture or confusion of goods with the consent of the owners, and each remains the owner of his share. Benjamin on Sales, 5, 46 O. S. 244, 48 O. S. 255, 133 Mass. 154, 160, 117 Pa. St. 589, 603.

Sec. 2264. Action to recover purchase price on sale—When article unsuitable for use—Must be rescission and tender back.

If the jury find that the machine furnished would accomplish what his contract called for, then he is entitled to recover the price of the machine together with interest as claimed in his petition.

If, on the other hand, after a full and fair trial of the machine, under the conditions that the contract called for, the machine failed to cut in a suitable manner veneers up to three-eighths of an inch in thickness, the defendants, or the parties for whom the machine was purchased, had a right to tender

back the machine to the plaintiffs and to rescind the contract. Or, if the plaintiffs refuse to receive back the machine, to place the same in storage at their expense and risks. If you do not find from the evidence that the machine as constructed was capable of performing the work that the contract required of it to perform, under the conditions laid down by the court, you will then look at the testimony as to how the defendants dealt with the machine. If, after using all proper efforts to make the same work, with the wood properly prepared for the purpose, and the operator was of sufficient skill, the machine failed to perform what was required of it, the defendants had a right to tender it back, if done promptly, and thereby rescind the contract. But under such circumstances it was their duty to act promptly, and if they failed to do so, and used the machine for a considerable period of time afterwards, they no longer had a right to return it.

If you find from the testimony that the machine was not capable of performing the work for which it was purchased under the warranty, and that the defendants, after fully satisfying themselves of this fact, tendered back the machine to the plaintiffs, the plaintiffs would have no right to recover; but if you should find on the other hand that after the defendants found that the machine would not comply with the terms of the contract, they still continued to use it in their business for a considerable period of time, unless you find that they had a right to do so by permission of the plaintiffs, they would then forfeit their right to return it, and their only recourse would be, then, in a suit to recover the purchase money, to set up the warranty and to show how much less valuable the machine was than its contract price, and in such case the sum then shown by the evidence to be the value of the machine to the defendant, or to the O. B. Co., is all the plaintiffs could recover, and with interest from that time.

I will say that in case you should find that the machine did not comply with the terms of the contract, and you should further find that B. & Co., or the O. B. Co., acted with due promptness in tendering it back, that in such case if you should

find such a state of facts to exist from the testimony, B. & Co. would be entitled to recover the amount of commission, or amount that they would be entitled to receive on the machine if it had been kept by the O. B. Co., and also the amount of the expense they were put to.¹

¹ Dwyer, J., in *The Brownell & Co. v. William T. Powers*. Dismissed in supreme court.

Sec. 2265. Acceptance and continued use of thing sold after knowledge that it will not work.

But if after the lapse of such reasonable time the defendant had the knowledge that the machine could not perform the stipulations of the contract, or reasonably ought to have had such knowledge, though it may have given plaintiff notice to remove the same, and that the defendant would not accept the same as performance of the contract, yet if the defendant continued to use and operate the same and treated the machine as its own, it would be liable to plaintiff to pay therefor the actual value of the machine in the condition it was when finally accepted by the defendant, considering its capacity to perform or not to perform the work stipulated for in the contract, not to exceed the contract price for the machine.¹

But if you find that the machine was not worth as much as the cash payment and the note paid, then the defendant would be entitled to recoup the difference between the amount of the cash and note paid, and the value of the machine so found by you; but this instruction must be understood as only applying in case you find the machine to be less in value than the amount of the moneys actually paid, that is, the cash payment and the amount paid on the first note becoming due.²

¹ Should it not have been charged that the value of the property as it would have been if made up to the guaranty less the difference of that value and what it was actually worth as it was? No, because there was no evidence offered to charge that the contract price was not the true value of the property guaranteed to be delivered, which price is presumed to be the value of the property in the absence of allegations and proof to the contrary.

² Voris, J., in *The Brownell Co. v. The J. C. McNeil Co., Summit Co. Com. Pleas*.

Sec. 2266. Fraud and deceit in sale of property—Parties dealing on an equality.

Deceit or fraud in business transactions consists in fraudulent representations of contrivances by which one person deceives another who has a right to rely upon such representation, or has no means of detecting such fraud. It is the law that fraud vitiates every contract. There is no exception to this rule. When fraud is proven to have promoted the making of a contract, it is void and can not be enforced. Fraud taints every transaction which is the result of it. But fraudulent representations in the sale of property will not *in themselves* always constitute deceit which will be the subject of an action for damages.

Where parties deal with each other on a footing of equality, there must be some existing circumstances or some means used calculated to prevent the detection of falsehood or fraud, and impose upon a purchaser of ordinary intelligence, prudence, and circumspection. If the purchaser has full opportunity to examine the property, and can easily and readily ascertain its quality and value by inspection, and he neglects to do so, then any injury which he may sustain by such negligence is the result of his own folly, and he can have no relief at law, unless the representation was of such a character as to mislead a prudent person or put him off his guard. The law wisely and justly presumes in such a case that a purchaser will take care of his own interests, and that, when he distrusts himself, his own judgment and shrewdness, he will protect himself from imposition.¹

¹ Pugh, J., in *Spencer v. King*, Franklin Co. Com. Pleas.

Sec. 2267. Same continued—Opportunity of inspection.

When the purchaser has a full opportunity to inspect the property, but fails to do so, and the representations were not such as should have misled him, he has no right to complain if the property sold does not measure up to the representations of the seller.¹

¹ Pugh, J., in *Spencer v. King*, Franklin Co. Com. Pleas.

Sec. 2268. Same continued—What commendations may be made—Dealers talk.

It is well known that, in the course of trade, vendors will speak in terms of high commendation of the property which they are offering for sale. Such “dealing talk” is not deemed in law as fraudulent, unless accompanied with some artifice calculated to deceive the purchaser and throw him off his guard, or some concealment of intrinsic defects not easily discoverable by reasonable diligence and care.¹

¹ Pugh, J., in *Spencer v. King*, Franklin Co. Com. Pleas.

Sec. 2269. Expression of opinion by seller as to amount, value and quality.

The opinion which the seller of property expresses concerning the amount, value, and quality is frequently asked for and given at sales, and is never ground for a law suit when it proves to be untrue, if it was only an opinion and was honestly given.

But if the statement of the value was more than an opinion, if it was an affirmation of a specific material fact, if it was deliberately made by the seller who had superior knowledge in regard to it, and if it was acted upon by the buyer, and if it was known to the seller to be false, it may be deemed fraudulent and a sufficient basis for an action. The rule of law applicable to this matter is this: The property in question^a was situated in another state not accessible to the observation and judgment of either party. If the defendant had knowledge of its value superior to the other party, if he deliberately represented that it was worth ——— dollars per acre, and that was more than the general praise or puffing which sellers are liable to indulge in, if he knew it was false, and if the plaintiff, acting upon such representations, purchased the property, it is competent for you to infer that it was a fraudulent representation, unless you further conclude that it was not material. If you find that the representations as to the value of the land were only opinions, only trade talk, then the plaintiff can not recover, notwithstanding

ing the opinions were not well founded. The law does not assist the purchaser who pins his faith to the exaggeration of the value of property made by sellers of it.¹

¹ Pugh, J., in *Spencer v. King*, Franklin Co. Com. Pleas.

Sec. 2270. Breach of warranty in sale of horse.

1. *Express warranty defined.*
2. *Statement of opinion.*
3. *Opportunity for inspection and examination.*
4. *Measure of damages.*

1. *Express warranty defined.* Now, gentlemen, it will be necessary for the court to define to you what is meant by an express warranty, because it is an express warranty that the plaintiff here relies upon as the ground for his recovery, and a breach of that warranty. I will, therefore, state to you the law on the subject of warranty.

Any distinct affirmation or assertion of the quality or character of the thing sold made by the seller during the negotiations for the sale which it may reasonably be supposed was intended to induce the purchaser and was relied upon by the purchaser, will be regarded as a warranty, unless accompanied by a statement that it is not intended as such.

2. *Statement of opinion.* A mere statement by a seller of his opinion, which falls short of being a positive affirmation of a fact upon a matter about which the purchaser is to exercise his own judgment, does not amount to a warranty. The test as to whether or not the language used is a mere expression of opinion, or a warranty, is whether it purported to state a fact upon which it may fairly be presumed the seller expected the buyer to rely, and upon which a buyer would ordinarily rely, and upon which he did rely. The mere fact that the purchaser has an opportunity to inspect the property sold, will not relieve the seller if there was a specific warranty covering the defect complained of, but the opportunity to make an examination is to be considered always in determining whether the statement constituted a warranty.

3. *Opportunity for inspection and examination.* Where a full and fair opportunity to inspect and examine the thing sold is afforded to the buyer, the rule that the purchaser must beware or that he purchases at his risk applies as to all defects which a reasonable inspection and examination would have disclosed, unless they are covered by clear and express warranties. The rule is where a full and fair opportunity to examine and inspect the goods sold is afforded to the buyer, that he may cheat himself if he sees fit, but the seller must not actively assist him to do so or throw obstructions in the way of a full and fair opportunity to inspect and examine.

When the seller is guilty of fraud by concealing the defect, or the defect is really not discoverable by inspection, the fact of an inspection is not material, and it is always proper to inquire whether the buyer's failure to inspect was or was not due to the seller's persuasion or assurance. When the declarations of the seller as to the quality of the article sold are clear and explicit so that there is a clear warranty of quality, the buyer has a right to rely on his, and such warranty is not affected by the failure to inspect and examine before making the purchase. The liability of a seller arises from his own misrepresentation and is not affected by the want of diligence of the buyer in the matter of inspection, if he relied upon the representations. But defects which are plain and obvious to the purchaser, or which were known to the purchaser at the time of the sale, are not covered by a warranty unless they are expressly referred to as being included in the warranty.

Applying the rule to this case, if the plaintiff knew that the mare was wind broken, then that defect would not be covered by the warranty.

The same is true as to any defects in either of the horses if you find there was any, which you may find from the evidence was known to the plaintiff at the time of the purchase of the horses by him. A warranty does not cover such defects as a casual inspection or observation will disclose to the buyer; that is, those defects which are plain or open and obvious to every person.

When the property is before the buyer, he is presumed to make some use of his senses, and therefore, he is held to have purchased with knowledge of the defects which would be patent to an ordinary observer in the same situation. But, of course, this rule does not apply if the seller used artifice to conceal and does conceal defects which would otherwise be obvious to the purchaser. If the seller does anything to divert the attention of the purchaser from defects, or to mislead him as to defects which would ordinarily be obvious to an ordinary observer, the rule which excludes obvious defects from a warranty will not be applicable.

In the absence of an express agreement, a warranty of the condition of property sold relates to the time of the sale. So that if there was a warranty in this case, it related to the time of the sale and could not be made to apply to the condition of the horses in the future. The question is, did they come up to the warranty at the time of the sale, if you find there was a warranty. If they did, that is, if the horses were sound when sold, then there was no breach of warranty because afterwards the horses may have become unsound. But if the horses were warranted to be sound, and you find that they were not sound, or that either of them was not sound at the time of the sale, then there would be a breach of the warranty unless you find that the only defects which they had were known to the plaintiff, or were open and obvious. Of course, you can only consider such defects as are alleged in the petition, if any are shown to have existed in the horses at the time of the sale.

4. *Measure of damages.* If you find that the plaintiff is entitled to recover, the measure of his damages will be the difference between what these horses would have been worth if they had been as they were warranted to be, and what they were actually worth as they in fact were.

In addition to this, the defendant would be liable for breach of warranty for the reasonable expenses of keeping and maintaining the horses up to the time when the plaintiff discovered they were unsound, and if he offered to return them to the de-

fendant and to rescind the contract and the defendant refused to rescind and take back the horses, then the plaintiff will be entitled to recover for the reasonable expense of keeping the horses for a reasonable time to effect a sale. And what would be a reasonable time to effect a sale is a question of fact for the jury to determine from all the evidence before you. And what the reasonable cost of keeping the horses was at that time is also a question of fact to be determined by you from all the evidence.¹

¹ Gould v. Potter, Court of Com. Pleas, Franklin Co., O. Bigger, J.

CHAPTER CXXXIV.

STATUTES OF LIMITATIONS.

SEC.

2270a. Revival of debt by promise.

2271. New promise to be in writing.

SEC.

2272. Limitation upon an account.

Sec. 2270a. Revival of debt by promise.

“The promise by which a discharged debt is revived must be in writing, clear, distinct, and unequivocal. There must be an expression by the defendant of a clear intention to bind himself to the payment of the debt. The new promise must be distinct, unambiguous, and certain. The expression of an intention to pay the debt is not sufficient. There must be a promise before the debtor is bound. An intention is but the purpose a man forms in his own mind; a promise is an express undertaking, or agreement, to carry that purpose into effect, and must be express in contradistinction to a promise implied from an acknowledgment of the justness or existence of the debt.”¹

¹ Shockley v. Mills, 71 Ind. 292.

Sec. 2271. New promise to be in writing.

“The jury, in order to take the case out of the statute of limitations and entitle the plaintiff to recover, must find from the testimony that the defendant has, within the last —— years before the commencement of this action, made his promise in writing to pay said note (or whatever it may be), or that he has actually paid thereon some portion of the principal or interest thereon within the time aforesaid.”¹

¹ Bridgetown v. Jones, 34 Mo. 472.

Sec. 2272. Limitation upon an account.

The court further says to you as a matter of law, that where the statute of limitations is set up against an account, each item

of the account is barred in six years after the right of action accrued thereon, unless it is taken out of the statute on some special ground.

Evidence has been given tending to show the dates when the various items of the defendant's account accrued, and if you find from the evidence in the case that any or all the items of such account accrued more than six years before the commencement of this suit, then, in order to prevent the statute of limitations running against such items of account, the defendant must show by a preponderance of the evidence in the case that such items of account were made as payments upon the note in question, and was so understood by the parties at the time; and, if you find that these items of account were not made as payments on the note, was not intended to be such by the parties at the time, the account was made and the goods furnished, then they would not be credits upon the account, and all items in defendant's said account which accrued more than six years before the commencement of this action would be barred by the statute of limitations, unless, as I have said to you, that when they were furnished to the plaintiff's decedent they were to be as credits upon the note, and, if they were, they should be allowed by you.¹

¹ Gillmer, J., in *McGaughey, Admr., v. Cramer, Trumbull Co. Com. Pleas.*

CHAPTER CXXXV.

STREET RAILWAYS.

PASSENGERS, PEDESTRIANS, VEHICLES.

SEC.

2273. High degree of care required of common carrier.
2274. Company owes utmost or highest degree of care to passenger.
2275. Duty of, as common carriers and as to cars and appliances.
2276. Railway company not an insurer—Bound not to expose passenger to hazards—Incidental hazards assumed by passenger.
2277. Relation of passenger created on acceptance of fare.
2278. Company bound for acts and improper conduct of employees.
2279. Acceptance of person as passenger creates relation.
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2281. Starting car before passenger seated.
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Sec. 2273. High degree of care required of common carrier.

The law requires a high degree of care on the part of a railway company toward a passenger, that it will carry him (or her) to destination. This does not mean the highest degree of care, the highest possible degree of care. The measure of high degree of care required of defendant in this case means as high a degree of care as is reasonably consistent with the means at hand for the management of its car. The law requires under all the circumstances disclosed in the evidence in the case

would require the railroad company in the management of its car, that its agents, servants and its employes, the motorman and conductor, should exercise reasonable care, such degree of care as an ordinarily prudent person would have exercised under all the facts and circumstances.

Corporations act through their agents. Therefore what the motorman or conductor did on the day in question with reference to running the car in so far as its passengers were concerned, would be the act of the defendant company.¹

¹ Booth, Street Rys., sec. 328.

Sec. 2274. Company owes utmost or highest degree of care to passenger.

In accepting the passenger for transportation, the defendant company can not be heard to say that it is not liable for the injuries caused to the passenger by its performance, while the relation exists, unless it has exercised, under all the circumstances, the highest degree of care and prudence in its management, and in the instrumentalities employed by it, that prudent men in like circumstances usually employ, and commensurate with the hazards ordinarily to be encountered. The rule requires that it should do everything necessary to secure the safety of its passengers, reasonably consistent with the business and means of conveyance employed in street railway carriage.

The law requires the utmost care and skill which prudent men are accustomed to use under similar circumstances,¹ but the rule is not to be pressed to an extent which would make the conduct of the business so expensive as to be wholly impracticable. But the common carrier must do all that any one in his position could reasonably do to guard against injury to his passenger, and to provide such facilities and instrumentalities as are required for the safe and prudent carriage of passengers for pay. In the absence of knowledge to the contrary, if the plaintiff acted in good faith, she was entitled to presume that the defendant would not be negligent in the performance of its whole duty to her, and that she would not be exposed to any

hazard that reasonable care and prudence could fairly guard against.²

¹ 7 W. L. B. 187.

² Voris, J., in *Dussel v. Akron St. R. R. Co.*, Summit Co. Com. Pleas. Affirmed by circuit and supreme court.

Company bound to exercise the highest care and foresight for the safety of its passengers consistent with practical operation of road. *Traction Co. v. Yarus*, 221 Ill. 641, 77 N. E. 1129; *Chicago St. R. Co. v. Palkey*, 203 Ill. 225; Booth, Street Rys., sec. 328.

Sec. 2275. Duty of, as common carriers and as to cars and appliances.

A common carrier of passengers on street car is required to exercise the highest degree of skill and care which may reasonably be expected of intelligent and prudent persons engaged in that business, in view of the instrumentalities employed, and the dangers naturally to be apprehended. The carrier is not an insurer of the safety of its passengers, and is not bound absolutely and at all events to carry them safely and without injury. They take the risks of their own carelessness of dangers that could not have been averted by the carrier by the exercise of the degree of care that the law demands.

A carrier is bound to furnish and maintain safe cars and appliances, whether old or new, but the employment of the appliances which are in universal and common use can not be said to be negligence, nor can it be said that the mode of construction is defective and not reasonably safe, when the danger is dependent upon conditions which are the result of the negligent conduct of the passenger or the company's servants.

A carrier will not be liable for injuries caused by the defect which is of such a character that no prudent man would anticipate danger from it, and so obscure as to escape observation during a careful daily inspection, and where there is nothing to show how long the defect has existed before the time of the accident.

The defendant is not guilty of a breach of its duty, if it secures the best appliances for the conduct, control, and safety

of its cars, after due investigation, and subjects the same to the best tests, and has all the machinery of its cars constantly and thoroughly examined; and the fact that one of the appliances fails to perform its usual duty going down a hill does not alone prove negligence on the part of the defendant company, provided the company has properly inspected and examined the machinery and tested it before use. The criterion of negligence in such cases is not whether the particular defect which was the cause of the injury could possibly have been detected by the use of scientific means of investigation, but whether the defect ought to have been observed practically and by the use of ordinary and reasonable care. * * * It was the duty of the defendant company, before attempting to descend the hill in question with its car, to know that its tracks over which the car had to run, and its appliances and machinery for stopping the same were in good order and properly adjusted.¹

¹ Gillmer, J., in *Klipp v. Trumbull Electric Railroad Co., Trumbull Co.* Com. Pleas. Booth on St. Rys., sec. 332.

Sec. 2276. Railway company not an insurer—Bound not to expose passenger to hazards—Incidental hazards assumed by passenger.

The defendant was not the insurer of the safety of the plaintiff in taking passage upon its car, but by accepting him as a passenger it bound itself to provide him with a safe transportation to the place of destination, and not to expose him to any hazards that reasonable care and prudence could prevent; and in taking passage upon the car he took upon himself the hazards incident to passenger transportation upon the defendant's car, when properly managed only; this would include getting on and off the cars.

As matter of public policy, the law requires a strict performance of the obligation assumed by the public carrier, to those taking passage upon its cars. The defendant can not be heard to say that it is not liable for the injury caused to the passen-

ger by its performance, while the obligation exists, unless it has exercised under the circumstances that degree of care and prudence in its management that prudent men in like circumstances usually employ, and commensurate with the hazards ordinarily to be encountered. The rule requires that it should do everything necessary to secure the safety of its passengers, reasonably consistent with the means and business of the conveyance employed in street railway carriage. The common carrier must do all that anyone in the position could reasonably do to guard against injury to its passengers and to provide such facilities as are required for the safe and prudent carriage of passengers for pay.¹

¹ Voris, J., in *Sourek v. The Akron St. Ry. Co.*, Summit Co. Com. Pleas. Booth on St. Rys., secs. 327, 328.

Sec. 2277. Relation of passenger created on acceptance of fare.

The acceptance of a person as a passenger, and the reception of the usual fare would constitute the relation of carrier and passenger, so that he could not be ejected from the cars of the defendant against his will during the passage for which payment had been made, except for improper conduct on his part.

Sec. 2278. Company bound for acts and improper conduct of employees.

The passenger rightfully pursuing his ride on the cars of the defendant is entitled to be treated with courtesy, and may not be treated rudely or be subjected to insult by the employees and agents of the company managing the cars, without incurring liability therefor.

In general, the passenger carrier is bound by the acts of the employees and agents in the scope of their employment, and must answer for their negligence, unskillful, or wrongful performance in the scope of such employment. In other words, the negligence or improper conduct of the conductors and other employees of the company managing the cars, in the scope of

their employment, is the negligence and wrongful acts of the company, for which it may be held liable.¹

¹ *Steffee v. The Akron St. R. R. Co., Summit Co. Com. Pleas.* Voris, J. Duties of street railway to its passengers. *Booth St. Ry., secs. 326, 327, 328.* In Ohio the utmost degree of care and skill is required, 7 W. L. B. 187, 6 O. C. C. 155.

Sec. 2279. Acceptance of person as passenger creates relation.

The acceptance of a person as a passenger, and the reception of the usual fare, would constitute the relation of carrier and passenger (*Booth on St. Rys., sec. 326*), so that he could not be ejected from the cars of the defendant company against his will during the passage for which payment had been made, except for improper conduct on his part. A passenger rightfully pursuing his right on the cars of the defendant is entitled to be treated courteously, and may not be treated rudely, or be subjected to insult by the employees and agents of the company managing the cars, without incurring liability therefor.¹

¹ *Steffee v. The Akron Street Railroad Co., Summit Co. Com. Pleas.* Voris, J.

"The existence of the relation depends largely upon the intention of the party at the time he enters, or while attempting to enter." *Booth, sec. 326.* He is a passenger while in the act of getting in the car. 32 *Minn. 1*, 137 *Mass. 210.* The relation ceases when the passenger steps from a car upon the highway, 139 *Mass. 542*, 31 *N. E. 391.*

Sec. 2280. Relation of passenger ceases when he has safely alighted on the street.

The jury is instructed that when a passenger on a street car has safely alighted on the street the relation of carrier and passenger is terminated.¹

¹ *Ann. Cas. 1912, B. p. 863, note.* *Schley v. R. R., 227 Pa. St. 494, 136 Am. St. 906; Booth St. Railways, sec. 326, note, 13 and cases cited.*

Sec. 2281. Starting car before passenger seated.

The jury is instructed that because of the public demands of rapid transportation on street cars, it is not the duty of the con-

ductor to wait until a passenger is seated before starting the car, but on the contrary the car may be signaled to start as soon as the passenger is fully on the car. The car may be started without waiting for a passenger to reach a seat after entering the same, unless there is some special and apparent reason for doing otherwise.¹

¹ Boston El. R. Co. v. Smith, 168 Fed. 628, 23 L. R. A. (N.S.) 890; Ottinger v. Railway, 166 Mich. 106, 131 N. W. 528, Ann. Cas. 1912, D. 578 and cases cited. As to old man, see Sharp v. R. R. Co., 111 La. 395, 35 So. 614, 100 Am. St. 488; Birmingham R. Co. v. Hawkins, 153 Ala. 86, 16 L. R. A. (N.S.) 1077.

Sec. 2282. Injury while boarding car.

1. *Statement of claim.* The claim of the plaintiff in this case is: That the defendant has not exercised in and about this matter the highest degree of care which was reasonable under all the circumstances, and such as would be expected of intelligent and prudent persons engaged in this business. The plaintiff claims that the car came to a stop, and that he stepped upon the foot-board, and before he had time to obtain a seat, the car, unexpected to him, started; that in so doing he lost his balance, and that he was thrown against one of the seats of the car and injured.

The defendant claims that the plaintiff attempted to board the car before it came to a stop, and in doing so he received the injury by falling against one of the seats of the car, and that the plaintiff was guilty of contributory negligence in thus attempting to board the car, and in not properly protecting himself in getting on the car at the time and the manner he did, and it claims that it has exercised the highest degree of skill and care which was reasonable under all the circumstances, that would be expected by intelligent and prudent persons engaged in this business, and that, therefore, there should be no recovery.

2. *Duty of passenger in boarding car.* It was the duty of the plaintiff in boarding, or attempting to board the car, to use ordinary care in securing a seat, and if he delayed unnecessarily, and for an unreasonable time by standing on the foot-

board or otherwise, and so contributed to his injury, he can not recover. It was not negligence as matter of law for the plaintiff to board the car while it was in motion, if you find he did so, yet if he did, he assumed all the risks of the ordinary and usual movements of the car, if operated with the utmost care by the defendant's employees, and if injured under such circumstances, he can not recover.

It was the duty of the plaintiff at all times while boarding or attempting to board the car, to exercise ordinary care and to make such use of his hands and arms to support himself, while on the footboard and entering from thence into the car, by means of the posts of the car, or other convenient means of support, if such there were, as a person of ordinary prudence, and in the exercise of ordinary care under like circumstances, would have exercised; and if he failed to do this, and so contributed to his injury, he can not recover. The court can not say to you that ordinary care required him to take hold of the posts with both hands, or with one hand, or whether, under the circumstances, it required him to take hold of the posts at all or not. The question is for the jury to decide, whether, under all the circumstances of this case, plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances in attempting to board this car. And this is also true of the defendant company. The question is left for you to determine whether or not the defendant company exercised the utmost care or the highest degree of care in carrying this passenger.

If you find the plaintiff got on the footboard of the car while it was at a standstill, and that, while he was standing on the footboard, and before he secured a seat, the motorman in charge of the car started, and in so doing exercised the utmost degree of care, starting it without any sudden jerk, then the court says to you that the defendant was not guilty of negligence, and your verdict must be for the defendant.¹

¹ Gillmer, J., in *Gee v. Trumbull Electric R. R. Co., Trumbull Co. Com. Pleas.* Booth on St. Rys., sec. 348.

Sec. 2283. Negligence in boarding car while in motion.

If the car was slowed up, so that it would be reasonably prudent for the plaintiff to attempt to get on, and in the exercise of reasonable prudence and care under the circumstances, he attempted to get on and failed, without fault on his part, he would not therefore be charged with contributory negligence; but if he did not so act prudently and carefully, under the circumstances then known to him, in attempting to get on while the car was yet in motion, then he would be held to have taken the risks of the want of such prudence and care, if voluntarily undertaken and encountered by him. * * *

We can not say to you as a matter of law whether or not it was negligence for plaintiff to attempt to board the car while it was in motion, if you find it to have been in motion from the evidence, or with one of his hands or an arm encumbered by his dinner-basket, but we leave it to be determined by you, from all the circumstances given you in the evidence, whether he was or was not guilty of contributory negligence in attempting to get on the car, as the evidence shows he did.

But if the car was not in motion, but was stopped to enable him to get on the car, and, while he was so attempting to get on, it was suddenly started, and before plaintiff had reasonable time to get on board, and the plaintiff was thereby injured, without his fault, then we say to you that the plaintiff would be entitled to recover therefor, if in other respects he is entitled to recover under these instructions given you.¹

¹ Voris, J., in *Sourek v. Akron St. Ry. Co.*, Summit Co. Com. Pleas. Booth on St. Rys., sec. 336.

Sec. 2284. Boarding car while in motion—Another form.

It is not negligence, as matter of law, for one to attempt to board such a car as that in question while in motion, but the question is one for the jury to decide from the circumstances as it finds them to be from the evidence. If the plaintiff was at the crossing aforesaid, and signaled the car, so that it was or should have been seen, and the speed of the car was thereupon slack-

ened, so that when it reached him the car was going so slowly that plaintiff was justified as a man of common prudence in endeavoring to enter it, he is entitled to recover, although the car did not come to a full stop, if his injury was due to the negligence of those in charge of the car in starting it at a more rapid speed while he was in the act of getting on board, without fault on his part.

If plaintiff was standing at said crossing and so signaled, and the car thereupon either was stopped, or so slackened speed, and he was so injured by their fault, and without fault on his part, the fact that his signal was not seen, and such stopping or slackening speed was done for some other reason, if such were the fact, would not affect his right to recover. So stopping or so slackening speed, as to justify an attempt to get on board, would be an invitation to enter the car, if those in charge of it knew or should have known that plaintiff so intended, and in that case it was their duty to use proper care to see that the car was not started or its speed increased until he was safe on board.

It makes no difference as to plaintiff's right to recover whether the car started or increased speed suddenly or with a jerk, or otherwise, if its so doing was due to negligence on the part of those in charge of it, which was the cause of plaintiff's injury, without fault on his part. That is, if he was at the crossing and was justified under all the circumstances as a man of ordinary prudence, in attempting to board the car as he did.¹

¹ Kumler, J., in *Mt. Adams & Eden Park In. Ry. v. Peppard*, S. C. 2927. Judgments affirmed. Booth on St. Rys., sec. 336.

Sec. 2285. Injury to one who claims to have attempted to board car at crossing, where defense is that the attempt was to board while car moving between streets—A short charge.

Negligence in a case like this is the failure to observe a high degree of care towards plaintiff, if you believe his claim that he was in the act of boarding the car and becoming a passenger. If, on the other hand, he attempted to board the car while it

was running between streets, the only duty that was owing to him by the company was not to willfully or recklessly injure him.

1. *When a passenger.* The measure of care exacted of a common carrier of passengers is the highest degree of care; but that is only owing by such carrier when the person, as in the case of a street car, is in the act of becoming a passenger. He is to be treated as a passenger when he is in the act of stepping on the car at a stopping place, as well as when he gets into the car and takes his seat.

2. *Duty when persons in act of becoming passenger.* The law requires that defendant, as a common carrier, exercise a high degree of care for the safety of its passengers when persons are in the act of becoming passengers. The performance of this duty required the defendant to stop its car at the stopping place a sufficient length of time to enable the plaintiff in the exercise of ordinary care, to board it, if the claim asserted by him is true that he was at the street crossing and attempting to exercise his right to board the car. The rule can not apply unless he was there in that act. If the greater weight of the evidence proves that defendant did not perform this duty but was negligent and this negligence was the sole cause of the injury to plaintiff, your verdict should be for the plaintiff and you should in such event award him such damages as may compensate him for his injury, not beyond the amount he claims in his petition, including medical expenses as alleged by him.

3. *Attempt to board between streets.* The defendant claims that plaintiff himself was guilty of negligence which was the sole cause of the injury to him. It is claimed in evidence that plaintiff attempted to board the car between street crossings and while the car was running. A person has no right to board a street car except at regular stops. So then one who undertakes to board a street car between street crossings assumes all risks incident to such an act.

If the jury find that plaintiff did attempt to board a moving street car before it arrived at a street crossing or a regular stopping place, and that he attempted to board the car between the streets while it was in motion, and that such act on his part

was the cause of his injury, your verdict should be for the defendant.¹

¹ Goldforb v. Railway & Light Co., Franklin Co. Com. Pleas. Kinkoad, J. If those in charge of car exercise due care to see or hear those who wish to take passage, there is no liability by suddenly starting the car while one is attempting to enter, if they do not know that such person was attempting to get on. Booth Street Railways, sec. 348, note 166; Lamline v. R. R. Co., 14 Daly 144; Meriwether v. Ry. Co., 45 Mo. App. 528.

Sec. 2286. Contributory negligence in boarding moving street cars.

Whether or not it is negligence to board moving street cars depends upon the rate of speed at which the car is going. If the plaintiff attempted to board the car when it was moving at a rapid rate of speed, or such rate of speed as made it dangerous to get on, it was negligence on his part to attempt to board the car when it was so moving, and if that negligence contributed in any degree to his injury, he may not recover, although you may find that those in charge of the moving car were also negligent.

If the car was moving either slowly or rapidly, the duty did not devolve upon the driver to stop the car until the plaintiff got on and got into his seat safely. But if the evidence shows that the car was standing still, and especially if at a place where a passenger had a right to get on, or if it was standing still at any place that would give a passenger a right to get on, and the driver saw the plaintiff getting on, it was his duty not to move the car till he was on and had a reasonable time to take a seat, and if he failed to wait, if the evidence shows to you that the car was standing still, and that he failed to wait until plaintiff boarded the car, and he saw the plaintiff getting on, then it was negligence on his part, and the defendant company is liable for any injuries that may have been caused to him in that manner.¹

¹ Pugh, J., Franklin Co. Com. Pleas.

It is not negligence *per se* to board a car while it is moving slowly, 137 Mass. 210, 69 N. Y. 195; Booth on St. Rys., sec. 336. The person assumes all the ordinary risks. *Id.* The passenger must be given a reasonable time to board the car in safety. *Id.*, sec. 348.

Sec. 2287. Duty to stop at usual stopping places—Passenger on signaling attempting to board before it stops.

It is the duty of the defendant railway company to stop its cars at its usual stopping places to take on passengers, and for such reasonable time as to give them reasonable opportunity to get aboard, so as not to endanger the safety of the passenger; but where the cars are signaled to stop at other than regular stopping places, the plaintiff would not be justified in attempting to get on the car, until it had fully stopped, unless the plaintiff was reasonably misled into the belief by the concurring conduct of the defendant that it would be safe for him under the circumstances to get on board the car while so in motion.¹

¹ Voris, J., in *Sourek v. St. Ry. Co.*, Summit Co. Com. Pleas. See 128 N. Y. 583, 12 N. Y. S. 930.

Sec. 2288. Duty to stop car long enough to afford passenger reasonable opportunity to alight.

The court can not say to you as a matter of law how long the car of the defendant should have stopped when plaintiff alighted; but whether the car did stop, or whether it stopped long enough for plaintiff to alight with safety, are matters of fact for you to determine under all the circumstances of the case given you in the evidence. We do, however, say to you that the car ought to have been stopped long enough to give the plaintiff reasonable opportunity to alight in safety.¹

¹ Voris, J., in *Dussel v. Akron St. R. R. Co.*, Summit Co. Com. Pleas. Affirmed by circuit and supreme court. Booth on St. Rys., sec. 347.

Sec. 2289. Duty to assist passenger in alighting—Question for jury.

What actual assistance, beyond stopping the cars for a reasonable time, the conductor should have given to the plaintiff, if any, we leave as a question of fact for you to determine under

all the circumstances developed by the evidence; and you may consider the ordinances of the city, making it the duty of the conductor to assist passengers to alight, in connection with other evidence in the case, giving it such effect as you think it entitled to.

The defendant was not an insurer of the safety of the plaintiff in alighting from the car, but by accepting her as a passenger on its car it bound itself to provide her with a safe car to transport her to the place of destination, and not to expose her to any hazard in alighting that reasonable care and prudence could prevent; and in taking passage on the car she took upon herself the hazards incident to passenger transportation upon the defendant's car, when properly managed, and upon a car competent for the service to which it was applied at the time of the injury.¹

¹ Voris, J., in *Dussel v. Akron St. R. R. Co.* Summit Co. Com. Pleas.

Affirmed by circuit and supreme court.

Booth on St. Rys., sec. 349.

Sec. 2290. Injury to passenger while leaving car by being thrown from car.

The fact that the plaintiff was injured by either having been thrown or by falling from the car does not, in itself, justify you in concluding that the defendant's employees were negligent, as charged in the plaintiff's petition. Negligence can not be assumed; it must have been proved by affirmative evidence.

(a) *Duty of carrier to use high degree of care towards such passenger.*

The defendant, being a common carrier of passengers, was required, through its employees in charge of the car, to exercise the highest degree of care which might be reasonably expected of intelligent and prudent persons engaged in the business of running street cars, considering the instrumentalities employed, and the dangers naturally to be apprehended. But the defendant was not obliged to insure the safety of the plaintiff as one of its passengers; it was not bound, absolutely, and at all events, to carry him safely without injury.¹

(b) *Duty of such passenger—Correlative duty of passenger and carrier.*

There was also a duty resting upon the plaintiff while he was a passenger upon the defendant's car. It was his duty to exercise that ordinary care and prudence which a prudent man would himself observe to save himself from injury. The degree of care on the part of the railroad company was the highest degree of care and skill; the degree of care on the plaintiff as a passenger was ordinary care and skill. If he was guilty of negligence, if he did not observe ordinary care, and that contributed to his injury, he is not entitled to recover damages from the defendant.

If the plaintiff was negligent, and his negligence in any degree contributed to the plaintiff's precipitation or fall from the car, he can not recover.

(c) *Plaintiff voluntarily leaving car while in motion.*

Therefore if the plaintiff voluntarily left his place in the car, took his position on the step, and there remained while the car was going at the rate of eight or ten miles an hour, he thereby assumed the risk of any injury which might be caused by the usual or ordinary movements of the car. So, if he voluntarily jumped or stepped off the car while it was going so fast as to render the act dangerous, the fact that the car did not stop at ——— street was no excuse for him to so jump or step off the car, and he was guilty of contributory negligence.²

¹ Booth on St. Rys., sec. 327.

² Pugh, J., in *Cronin v. Columbus Street Ry. Co.*, Franklin Co. Com. Pleas. Leaving car while in motion. Booth on Street Railways, sec. 337; *Ganley v. Brooklyn City Ry.*, 7 N. Y. S. 854.

Sec. 2291. Duty to stop car when desired stop communicated to conductor on boarding car.

The plaintiff does not claim that he signaled, or otherwise informed the conductor just before the car reached ——— street that he wanted the car to stop, but that when he paid his fare he gave him that information. If the conductor was so informed that the plaintiff wanted to get off at ——— street, it was his

duty to stop the car so as to give him an opportunity to alight in safety, and if he failed to do that, and it was the cause of the plaintiff's injuries, and if plaintiff's negligence did not contribute to them, the company is liable to respond in damages.¹

Must have been the proximate cause.

If you find that he did give the conductor that information, was the failure of the conductor to have the car stopped the proximate cause, the legal cause of the plaintiff's precipitation from the car, if that was proved; did the plaintiff exercise ordinary care in stepping out on the car steps, before the car stopped, and standing there as he says he did? If it was not the observance of ordinary care, the question for you to consider is, whether that was not the proximate cause of him being thrown, or of his falling from the car, instead of the failure of the conductor to stop the car.

If that conduct of the plaintiff was the proximate cause, he can not recover. The failure of the conductor to stop the car must have been the proximate cause to entitle him to recover. It is difficult to make this plain; I mean what is in law proximate cause. His precipitation or falling from the car must have been the natural or probable result of the conductor's failure to stop the car, if that was proved. The failure of the conductor to stop the car, if a fact, must have been the direct cause of his injuries, not in point of time, but in relation to the plaintiff's precipitation or falling from the car. Between the failure of the conductor to stop the car, and the precipitation or falling from the car, there must have been no intervening and independent cause, disconnected with the fault of the conductor to stop the car, and self-operating, which produced the plaintiff's precipitation or falling from the car. If the plaintiff informed the conductor that he wanted the car stopped at —— street, he had a right to expect that he would stop it there so he could get off; but did that authorize him, in the exercise of ordinary care, to go out and get on the step of the car, if that was a place of danger, when the car was going? Did it authorize him as a prudent man to go out on the step? If you

answer these questions in the affirmative, then you must find for the plaintiff; but if you answer them in the negative, you must conclude that the conductor's failure to so stop the car was not the proximate cause of the plaintiff's precipitation or falling from the car.²

¹ See Booth on St. Rys., sec. 337.

² Pugh, J., in *Cronin v. Columbus Street Ry. Co.*, Franklin Co. Com. Pleas.

Sec. 2292. Injury to passenger while alighting from car.

This charge of negligence, in substance, is that after the car had stopped, and while she was in the act of alighting from the step of the car, it was started up before she had succeeded in alighting, and caused her to be thrown to the street and injured in the manner described in the petition. If the car had come to a stop, and while it was standing the plaintiff attempted to alight, and before she had succeeded in alighting safely the car was started up, and such sudden starting up of the car threw her to the street and injured her, this would be negligence on the part of the defendant which will render it liable for damages to the extent of her injuries.

The court says to you, gentlemen of the jury, that the plaintiff must prove this charge of negligence by the greater weight of the evidence in order to entitle her to recover. The court also says to you that she will not be defeated of a recovery if you should find it to be the fact that the car had not absolutely stopped before she attempted to alight, if it had almost stopped or slowed down to a rate of speed which would enable one to alight from it with reasonable safety, and was suddenly started up again or its speed unexpectedly increased, thus causing the plaintiff to fall to the street—the gist of the complaint being the sudden and unexpected starting up of the car. But the mere fact, if you find it to be a fact, that before the car had stopped, and as it was slowing down to stop, its rate of motion was increased, does not amount to negligence as a matter of law, and would not conclusively show that the defendant was negligent. Whether it was negligence or not, if you find that before it was

stopped its rate of motion was increased again, is a question of fact to be determined by you from all the evidence before you, under the rule I have stated to you with reference to the measure of duty owed to the plaintiff by the defendant.

The defendant not only denies its negligence, but says further that the plaintiff's own negligence was a direct and proximate cause of her injuries. It is a rule of law as well settled as that with regard to the obligation of the defendant to exercise care for the safety of the plaintiff, that the plaintiff herself was bound to exercise care for her own safety; and if she failed to do so on the occasion in question, and her own negligence was a direct and proximate cause of her injuries, then she can not recover, even though you find that the defendant was also negligent. Of course, if the plaintiff's injuries were caused solely by her own negligence, she can not recover.

If you find that the car was being stopped upon the request of the plaintiff, and without negligence on the part of the defendant, the plaintiff fell because she attempted to get off while the car was in motion, she can not recover.

The defendant has also stated what its claim is with regard to the plaintiff's negligence; and the defendant is also confined in its proof to the plaintiff's negligence stated in its answer. This negligence is stated to have been that she attempted to alight from the car after it was being brought to a stop for the purpose of allowing her to alight, and before the car had come to such stop. The mere fact that she attempted to alight from the car when moving, if you find that to be the fact, is not conclusive evidence of negligence on her part. Whether it was negligence on her part under all the circumstances is a question of fact to be determined by you from all the evidence in the case. The duty which the law charged upon her for her own safety was to exercise ordinary care; that is, such care as persons of ordinary prudence are accustomed to exercise under like circumstances and conditions. If she used ordinary care for her own safety, then she was not negligent. If she did not exercise ordinary care for her own safety, and this want of

care on her part for her own safety was the sole cause of her injuries, or was a contributing cause of her injuries, she can not recover.

As I have said, the defendant has the burden of proving contributory negligence; that is, that the negligence of the plaintiff directly contributed to her own injuries; and if you find that the defendant was guilty of the negligence charged, and that this negligence was the direct and proximate cause of plaintiff's injuries, then to make the defense available that her own negligence contributed to that of the defendant to cause the injuries, this defense of contributory negligence must be proven by the greater weight of all the evidence; but if there is as much evidence that the plaintiff's injuries were caused solely by her own negligence as that they were caused by the negligence of the defendant, then the plaintiff must fail and your verdict should be for the defendant, for the reason that the greater weight of the evidence must be in favor of the plaintiff's claim that the defendant's negligence caused her injuries; and if there is as much that they were solely caused by her own negligence, then the plaintiff does not have the weight of the evidence on her side.

If you find that the weight of the evidence does not prove that the defendant started the car up after it had stopped, or suddenly increased its speed after it had almost stopped, that will be the end of your deliberations, and you should render your verdict for the defendant. But if you find that the defendant was negligent as alleged, and that its negligence was the direct and proximate cause of the plaintiff's injuries, you will then inquire whether the plaintiff herself was guilty of contributory negligence which directly and proximately contributed to cause her injuries. If you find that the preponderance of the evidence proves that she was guilty of contributory negligence, then your verdict should be for the defendant. But if you find that the defendant was negligent as alleged in the petition, and that this was the direct and proximate cause of the plaintiff's injuries, and that the defense of contributory negligence on her part has not been proven, then your verdict should be for the

plaintiff, and you will proceed to determine the extent of her damages. These should be in such an amount as will fully compensate her for the injuries which you may find have directly resulted from the negligence of the defendant. This will include compensation for the pain and suffering, physical and mental, directly resulting from her injuries; and also for any future pain and suffering, if her injuries are of such character as to cause her pain in the future; also compensation for loss of time, if any, resulting from her injuries during the period when she was disabled, if she was disabled, from pursuing her ordinary avocation; and also for any permanent impairment to her ability to perform labor, if you find there has been any such permanent impairment.

If you find that the plaintiff is entitled to recover general damages, she will be entitled also to recover, in addition to her general damages, her expenses actually and necessarily incurred by way of medical attendance and hospital and ambulance service, and which evidence shows she expended or for which she incurred an obligation to pay, but not in excess of the amount claimed in the petition. But you can not award special damages unless you find that she is entitled to recover general damages.¹

¹ *Sheets v. Columbus Ry. & L. Co., Franklin Co. Com. Pleas. Bigger, J.*

Sec. 2293. Stopping cars for passengers to alight—Duty of conductor as to passenger alighting.

If you find from the evidence that in this case the defendant's conductor stopped the car himself upon a notice communicated to him by this plaintiff, and started the car before she had fully alighted, then your verdict will be for the plaintiff.

(a) *By gripman to receive passenger—Passenger leaving car at that time.*

If, however, you find that the conductor himself did not stop the train, but that it was done by some other person on the train at the plaintiff's request, or that it was done by the gripman

in order to receive a passenger from the street, and if, upon the stopping of the car, the plaintiff proceeded to leave it, and in leaving it the train was started without any notice or expectation on her part, and she was thrown to the ground and injured, then it will be for your decision to determine whether the defendant was guilty of ordinary neglect which directly caused the injury complained of.

(b) *Knowledge of conductor of intention of passenger to alight—Duty to look out for departure.*

If the conductor knew, or had reason to know, that the plaintiff intended to leave the car when it stopped at the corner, and if you find that at that point the car stopped, it was then the duty of the conductor to look out for her departure, and to wait such length of time as would have enabled him to know that she had not given up the intention of getting out of the car. And if, under such circumstances, he did this—that is, if you find that he had notice, or that he really knew that she wanted to get off at that point, and if you find that he did wait long enough so that he was enabled to determine that she did not intend to get off the car, and yet, notwithstanding what he did, this injury happened, or this thing happened, then there is no negligence chargeable to the defendant, and your verdict will have to be in favor of the defendant.

If, however, under such circumstances he did not look for her departure, and did not wait the requisite time already described to you, and if in consequence thereof, and a direct result of it, the car was caused to start, and she was thrown and injured as she claims, then there is negligence as would make the defendant answerable to the plaintiff.

If, however, you should find that the conductor did not have reason to know that the plaintiff intended or wanted to leave the train where it stopped at the corner, then you are to determine whether his want of knowledge was the result of any negligence on his part, whether it was negligent for him to proceed afterward to the grip-car before ascertaining whether any passengers intended to get off, or whether it was negligent on his

part, in view of the crowded condition of the car, to abstain from working his way through the car towards the front, and if he had done so, whether he could have ascertained that she wanted to leave the car—whether it was negligent for him to do what he did under the circumstances, and if that negligence had a tendency or caused him to remain in ignorance as to her intention.

Now, in determining this question of negligence, should you find that he had no notice, or did not know that she was about to leave the car, or intended to leave the car at this point, you can take into consideration whether, if he had exercised care with reference to ascertaining whether she wanted to get out of the car or not, it would have helped him any. You can take that into consideration, because even if he were careful, and even if he had taken steps under the circumstances, keeping in mind the hour of the day, the condition of the train, the management of the train at that point, even if, under those circumstances, had he been careful, and yet could not have ascertained, under the circumstances, that she wanted to leave the train, if you even should find that that was careless on his part, that carelessness could not be said to have contributed to her injury, and in that event your conclusion upon that point must not be against the defendant.¹

¹ Schroder, J., in *The Mt. Adams & Eden Park Inclined Ry. v. Wysong*. Dismissed in supreme court. To save reversal on account of excessive verdict remittitur was made in circuit court. See Booth on St. Rys., sec. 349.

Sec. 2294. Injury while alighting from car by catching clothing on car—Duty of passenger and company.

“The jury are instructed that this case is to be determined upon the facts offered in evidence, and not upon any theory advanced to explain circumstances; that is to say, that before the plaintiff shall be entitled to a verdict for any amount, the evidence must prove to the jury that the defendant, its agents or employees had carelessly and negligently maintained or permitted some obstruction to be on or upon the plat-

form or step of said car, whereby the dress of the lady in the act of leaving the car would be caught. The evidence must prove this fact. If it does not, and the defendant, its agents or employees not being otherwise negligent in the discharge of their duty, and the plaintiff herself, in leaving said car carelessly, neglected, in the exercise of ordinary care, to handle or take care of her dress skirts, and such negligence or carelessness of the plaintiff was the proximate cause of her injury, she can not recover, and your judgment should be for the defendant."

"The plaintiff in this case claims that her dress was held in some way upon the platform of the defendant's car, and that the conductor negligently started the car while it was so held. If it was held upon the platform or step by some object or force, that is a separate and independent fact, and if you find the evidence justifies you in finding such to be the fact, you may do so without determining how or by what it was held."

"The plaintiff was not bound to apprehend any carelessness upon the part of the defendant. She had a right to rely upon the defendant having its platform in good condition and free from obstacles of an unusual character upon which her dress might catch. She was not bound to apprehend that the conductor might start the car while her body was in contact with it, or until she was free from it and had reached a position of safety. She was not bound to apprehend that she might do anything that would place her in jeopardy. On the contrary, she had a right to place full reliance on the defendant doing its full duty towards her, and exercising the high degree of care which the law requires of it."¹

¹ *Patterson v. Inclined Plane Ry. Co.*, 12 O. C. C. 280; *Booth on St. Rys.*, sec. 349.

Sec. 2295. Ejection of passengers for refusal to pay fare— Transfer tickets.

The carrier, in pursuance of his rights and duties, may eject from its cars persons on board who wrongfully refuse to pay the legal rate of fare; but this dangerous discretion must be

prudently and rightfully exercised. If you find that the transfer ticket came into the hands of the plaintiff wrongfully, it would not entitle him to ride on it; and if he attempted to ride on it, on refusal to pay the legal rate of fare he might rightfully be ejected from the car by the defendant. But if he pay the legal rate of fare and receive the transfer ticket from the transfer agent, to enable him to complete his ride to the point of destination for which he had paid, then he could not be rightfully ejected, so long as he conducted himself with propriety, and did not violate the reasonable rules of the railroad company.¹

¹ *Steffee v. R. R. Co.*, Summit Co. Com. Pleas. Voris, J.

Upon the subject and in support of charge, see *Mahoney v. Detroit City Ry.*, 53 N. W. 793; *Frederick v. Railroad Co.*, 37 Mich. 342.

Sec. 2296. Damages for wrongful ejection of passenger.

The jury must be instructed that the plaintiff, if entitled to recover, may be awarded the usual kinds of damages—compensatory and exemplary, which have been explained frequently elsewhere, by instructions given in other kinds of cases, but the charge given in the particular case found in the preceding sections will, nevertheless, be inserted here.

If you find for the plaintiff, the further consideration of damages comes in. In that case his damages should be compensatory, and in one aspect of the case they may be more.

Compensatory damages include such sum as in your judgment he ought to receive for the injuries caused by the wrongful acts, that naturally or ordinarily resulted from the wrongful acts. This includes injury to personal feeling, sense of humiliation and insult growing out of the manner of committing the wrong, the public exposure and imputation of crime to commit a fraud upon the company in beating a ride, by reason of the wrongs you find from the evidence were committed. This is a matter very much within the discretion of the jury, but this must be a discretion reasonably exercised.

If you find from the evidence that in the commission of the wrong it involved the ingredients of fraud, malice, insult or

oppression, and the plaintiff had conducted himself within the proprieties of the place, you may go beyond the rule of mere compensation and award exemplary or punitive damages; that is, such damages as will compensate him for the wrong done to him, and to punish the defendant, as well as to furnish an example to deter others. We feel it incumbent upon the court to say to you that in the exercise of your discretion to visit exemplary damages upon the defendant you should do it with exceeding caution. In case you should find for the plaintiff you may take into consideration, as compensatory damages, reasonable counsel fees employed by the plaintiff in prosecuting this action.¹

¹ Steffee v. The Akron Street Railroad Co., Summit Co. Com. Pleas. Voris, J. Booth on St. Rys., secs. 419, 197.

Sec. 2297. Duty of railway to travelers in street.

The street railroad company in the use of the street owes to the public using the street the duty to carefully and prudently exercise its right of running its cars on the street, so that it does not injure others; but it is required to exercise no higher degree of care than that required of the plaintiff, and that which the circumstances reasonably require, but this care must be commensurate with the hazards ordinarily attending the operation of its cars upon the public streets of the city.

The privileges granted to the railroad company to lay down its tracks and operate its cars are upon an implied condition that they will be used with due regard to the rights of the public in the highway, and that it will not be guilty of negligence, nor is the use of the street by the public for the purpose of traveling in the ordinary mode, an invasion of the rights of the persons operating the street railway. The public still retains the right to make ordinary use of the street, not inconsistent with a reasonable and prudent operation of the defendant's cars, and the railway company holds its privileges on an implied condition that the rights of the public shall not be unnecessarily impaired or lessened.

It is the duty of the defendant company to exercise ordinary care and diligence to prevent injury to persons lawfully traveling in the street occupied by its tracks. It is bound to know that the public may use the entire street when not in actual use by its cars, and it must employ reasonable means to prevent injury to those whom it knows or ought to know may rightfully so use the street. This knowledge requires that it shall exercise due care and diligence to make it reasonably safe to travel on the highway in the ordinary mode.¹

¹ Voris, J., in *Cranmer v. Akron St. Ry. Co.*, Summit Co. Com. Pleas. Booth on St. Rys., sec. 303.

Sec. 2298. Duty to use ordinary care to pedestrian.

The rights of travelers or pedestrians in the streets and a street railway company are equal, except as the equality of right may be affected by the fact that the street cars can not turn off the track. This fact, however, only affects the duty of the pedestrian, because neither the street railway company nor the pedestrian has a paramount right, the rights of each being equal. Street railways in using the streets of a city are required to make such reasonable use thereof as is consistent with the rights of other persons occupying the streets in conjunction with them. It is the duty of the company to exercise such reasonable and ordinary care in the management and operation of its cars as the particular circumstances may require to avoid injury to a traveler or pedestrian lawfully using the street and who is himself in the exercise of ordinary care and prudence.¹

¹ 36 Cyc. 1513, 1514; *Ford v. Railway*, 124 Ky. 488, 124 Am. St. 412.

Sec. 2299. When motorman may assume that pedestrian will get out of danger.

The jury is instructed that a motorman in charge of a street car, on seeing a person on the tracks of the railway, has the right to assume that he will get out of the way of danger as the car approaches. But he can not rely upon this assumption alone, without adopting other precautionary measures upon dis-

covery that the pedestrian is careless. He must sound the bell and give warning of the approach of the car; and the motorman in sounding the bell can not assume that all within hearing will take notice that a car is approaching, and he can make no such assumption in justification of his failure to take reasonable precautions until at least he has reasonable grounds for believing that his warning is heeded or the presence of the car is recognized, and that the person threatened is competent to protect himself by the exercise of ordinary care.¹

¹ *Riley v. R. R. Co.*, 82 Conn. 105, 72 Atl. 562.

Sec. 2300. Pedestrian may assume motorman will use due care.

The jury is instructed that a person walking in the streets of a city has a right to act upon the assumption that a motorman in control of and operating a street car will use due and ordinary care in managing the same, that he will have the car under reasonable control at a street intersection where people are crossing.¹

¹ *Pilmer v. Traction Co.*, 14 Idaho, 327, 125 Am. St. 161, 170.

Sec. 2301. Ordinary care required of person about to cross track at street crossing.

The jury is instructed that a person who is about to cross the track of a street railway is bound to exercise care proportionate to the danger to be avoided and the consequences which might result from the want thereof. The care to be exercised, the amount or degree thereof, depends upon the particular circumstances; but it is only ordinary care which is required, that which might be reasonably expected of persons of ordinary prudence.

Ordinary care does not require such person to anticipate negligence on the part of those operating the railway.¹

¹ *Railway Co. v. Snell*, 54 O. S. 197.

**Sec. 2302. Injury to person on track—Duty of motorman—
May presume pedestrian will be prudent—
Plaintiff may presume company will not be
negligent.**

The jury is instructed that if the motorman could by the exercise of ordinary care have seen the plaintiff, and stopped the car, and that by reason of the failure to so stop the car plaintiff was knocked down and injured, it would be such negligence on the part of the defendant as would enable plaintiff to recover provided plaintiff was not contributory negligent.

The motorman had the right to presume that the plaintiff would not attempt to cross the track when he was so near that it would be unsafe and dangerous for him to do so. He further had the right to presume that the plaintiff would step off the track before the car reached him, providing he was on it. He also had the right to presume that plaintiff would exercise ordinary care in attempting to cross the track, as we shall explain hereafter. And if the motorman, in relying upon these presumptions, as he had a right to do, ran his cars so close to plaintiff that he could not stop the same in time to avoid the accident, or in attempting to stop the car struck the plaintiff or brushed him off the track, then defendant would not be guilty of negligence.

The plaintiff had a right to presume, in absence of knowledge to the contrary, that the defendant company, in respect to the rate of speed at which it propelled its cars, would conform to any ordinance which the city had properly passed with reference to this subject, and it would not be negligence on his part to act on this presumption in exposing himself to such danger as could only arise through a disregard of the ordinance by the defendant company.¹

¹ Gillmer, J., in *Rapple v. Youngstown St. Ry. Co.*, Trumbull Co. Com. Pleas.

Sec. 2303. Relative rights and duties of pedestrian and street cars in streets.

The jury is instructed that neither the street car nor the pedestrian has any priority or privilege right over the other, except in so far as may arise from the fact, under special circumstances, that a street car can only run on the tracks. A street railway company and a traveler in the streets of the city have equal rights therein, but each must observe due and reasonable care to avoid and prevent accident and injury, taking into account the fact that the street cars are confined to the track, while pedestrians have freedom of movement.¹

¹ *Stewart v. Railway*, 88 Neb. 209, 129 N. W. 440, Ann. Cas. 1912, B. 860.

Sec. 2304. Duty of employees when car crossing street intersection where car on opposite track discharging passengers.

The jury is instructed that the employees in charge of a street car are bound to use due and reasonable caution and care [great caution] in crossing a street intersection at a point where a car on the opposite track is, [or has recently been] discharging passengers; the motorman on such car must keep a [sharp] lookout for persons passing behind the car on the opposite track, he must give ample and timely warning of the approach of the car by sounding the bell, and he must have it under such reasonable control as may enable him to readily and promptly stop the car if there is danger to such person so passing around the other car who is in the exercise of ordinary prudence.¹

¹ *Stewart v. Railway*, 88 Neb. 208, 129 N. W. 440, Ann. Cas. 1912, B. 861; *Bremer v. Railway*, 107 Minn. 326, 120 N. W. 382, 21 L. R. A. (N.S.) 887; *Creamer v. R. R. Co.*, 142 Ky. 340, 134 N. W. 193.

Sec. 2305. Duty in avoiding injury to children, apparently intending to cross street.

The jury is instructed that when a motorman observes a person in a place of safety, he has a right to assume that he will not put himself in a place of danger; but if such motorman does

see that there is imminent danger to a person in the street, it then becomes his duty to use every reasonable effort in his power to stop the car, and avoid causing an injury. If, by the exercise of proper and reasonable vigilance, the motorman could have seen the child in time to stop the car and avoid striking him, it was his duty to do so; and if, when he saw the boy, his conduct indicated that he was intending to cross the track, and that he had not seen the car or heard the signals, if any were given, it was the duty of the motorman to use every effort to stop the car.¹

¹ *Tecker v. Railway*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 842.

Sec. 2306. Duty of parents in permitting children to go in streets.

The jury is instructed that a parent is required to exercise ordinary care in watching and controlling his child in permitting the same to go upon the streets. It can not be said that a parent in sending a young child upon the street to do an errand is necessarily negligent. On the contrary it will depend upon the peculiar circumstances, and is a question for the jury to decide. The jury will therefore consider all the evidence and determine therefrom whether such parent was guilty of contributory negligence in permitting the boy to go, so as to preclude a recovery for his death by being struck by a street car, etc.¹

¹ *Tecker v. Railway*, 60 Wash. 570, 111 Pac. 791, Ann. Cas. 842; *Simon v. St. Ry. Co.*, 231 Mo. 65, 132 S. W. 250, 140 Am. St. 498.

Sec. 2307. Injury to conductor by being struck by telephone pole while walking along running board of car.

1. *Statement of claims of parties.*
2. *Burden of proof.*
3. *Negligence defined, and duty of defendants stated.*
4. *Alternative findings as to responsibility of railway company.*
5. *Knowledge of danger—assumption of risk.*

6. *Legal obligation of telephone company.*

7. *Alternative findings by jury as to liability of telephone company,*

8. *Measure of damages.*

1. *Statement of claims of the parties.* Plaintiff claims that while in the employ of the railway company as conductor on a summer car he was going west on ——— street, the car being an open one, along both sides of which was a board or step called a running-board, along which plaintiff had to walk while collecting fares; that as the car reached ———, and while the same was in motion, plaintiff walked along the right side of the car for the purpose of collecting a fare, when he was suddenly and violently struck on his left shoulder by a telephone pole owned and maintained by the telephone company. It is claimed that the pole was within about fifteen inches of the north edge of the running board while the car was passing at that place; that the pole leaned toward the car track, etc. Plaintiff claims that he did not know and had no means of knowing of the close proximity of the pole to the car tracks and passing cars, and that he was struck without any fault of his own. The negligence charged against both defendants is that they knew, or should have known of the existence of the pole and of the dangerous proximity thereof to the street car track and passing cars, that it permitted its tracks to be and remain in dangerous proximity thereto; that it permitted the pole to be and remain in dangerous proximity to the track, etc.

The questions of fact presented by the pleadings for the jury to determine, are whether the injury complained of was the result of or caused by the negligence of either or both of the defendants, whether or not either or both of the defendants were free from negligence which caused the injury and whether the injury was the result of or caused by the plaintiff's own negligence.

2. *Burden of proof, and credibility of witnesses.* The burden of proving that the negligence of either or both of the defendants was the cause of the injury to plaintiff rests upon him. This

must be shown by plaintiff by a preponderance of the evidence. It means that the negligence of the defendants, either or both of them, must be established by the greater weight of credible testimony; not necessarily by the greater number of witnesses. You must give such credence to the testimony of the witnesses as your judgment dictates, under the facts and circumstances as developed. You are the sole judges of the credibility of witnesses, and may give them such credit as seems proper under all the circumstances, considering their interest or want of interest in the case, their ability to learn, know and relate the facts.

3. *Negligence defined, and duty of defendants stated.* The defendants are charged with negligence.

Negligence is the failure to observe for the protection of the interests of another that degree of care, protection and vigilance which the circumstances reasonably demand. It is a failure to observe ordinary care under the circumstances of the particular case,—this case. Ordinary care is that degree of care which persons of ordinary care and prudence are accustomed to observe under similar circumstances. Ordinary care in this case is such care as reasonably prudent persons would observe in setting telephone poles close to street car tracks, or of persons who operate street cars, as a master, in close proximity to telephone poles, for the protection of persons engaged in operating the cars.

It was the duty of the defendant railway company as the employer of the plaintiff to use ordinary care and prudence to furnish him with a safe place to work. The railway company was not an insurer of the plaintiff's safety; it being bound merely to observe ordinary care in furnishing him with a safe place to work. It was the duty of the defendant railway company to observe ordinary care not to run and operate its cars in such proximity to any pole or poles which may be located and maintained in that position so that its servants in charge of the operation of the cars and in the observance of their duty, who are at the time observing ordinary care and prudence for their own safety, may not come in contact therewith and be

injured thereby. This duty rests upon the railway company even though the pole or poles were placed there by another company and was not part of the equipment of the railway company.

4. *Alternative findings by jury as to responsibility of railway company.*

If the jury find that the railway company used ordinary care to furnish a safe place to work, and that it maintained a safe place for plaintiff to work, and that it exercised ordinary care so that its cars were not run in such close proximity to any pole or poles which were located along the line of its track at the place in question in this case, so that its servant, to-wit, the plaintiff, as conductor in running and operating the car in question here, himself observing ordinary care for his own safety, could not come in contact with the pole in question, then the railway company can not be held liable for any damages which the plaintiff may have sustained by coming in contact with the pole, and your verdict should be in favor of the railway company in such case.

But if you find that the railway company did not exercise such care, that it was guilty of negligence, and if you find that such negligence was the proximate cause of the injury to the plaintiff, and that the injury was not caused by the plaintiff's sole negligence, and you further find that the plaintiff did not voluntarily assume the risk from injury from the pole, with full knowledge of its dangerous proximity to the track and passing cars, and with competent means of obtaining such knowledge, then the plaintiff is entitled to recover against the defendant, the railway company, and a verdict at your hands.

5. *Knowledge of danger—Assumption of risk by plaintiff.* If the plaintiff knew of the dangerous proximity of the pole to the track, or if by the exercise of ordinary care he could have known of it, and if he continued to work for the defendant upon the car as conductor with such knowledge, then he must be held to have assumed the risk of injury by coming in contact with the pole, and the plaintiff will not in such case be entitled to recover against the defendant, the railway company.

In determining the question of assumption of risk by the plaintiff, the jury will consider whether the alleged danger was an apparent or concealed one, the care required of him in either case being ordinary care, varying with the circumstances. The plaintiff must be charged with knowledge of dangers such as is involved in this case only so far as he would ordinarily obtain knowledge thereof in the performance of the duties required of him in his employment.

6. *Legal obligation of telephone company.* The legal obligation resting upon the defendant, the telephone company, was to exercise ordinary care in locating and maintaining its poles, and the pole in question here, and not to place and maintain them in such dangerous proximity to the track of the railway company, and that the same shall not be set or placed and allowed to remain in such close proximity to the track that the same may come in contact with the servants or employes of the railway company who are in the observance of ordinary care for their own safety in the operation of their cars along the line of such railway track, and which pass such pole or poles.

7. *Alternative findings by jury as to liability of telephone company.* If the jury should find that the injury resulted from the plaintiff's coming in contact with a telephone pole, and you should find that the telephone company was not guilty of negligence according to the rules of law stated in these instructions, that would relieve the railway company from the charge of negligence, because the negligence claimed by plaintiff against the railway company is the non-observance of ordinary care in running its cars in such close proximity to the poles erected by the telephone company as to endanger the safety of the servants of the railway company, and this plaintiff, who are in the observance of ordinary care for their own protection; so that it follows that if you find neither the telephone company nor the railway company to have been negligent in the particulars claimed, your verdict would be in favor of both the railway company and the telephone company. But if you find that both,

the telephone company and the railway company are each guilty of negligence under the rules herein given you, which renders them liable in damages to the plaintiff, and that the injury was not caused by the plaintiff's sole negligence, your verdict should be rendered jointly against both defendants for such damages as in your judgment you believe plaintiff to have sustained.

If such be your verdict, the amount assessed should be a lump sum, without apportionment between the two defendants.

8. *Measure of damages.* If you find the plaintiff is entitled to recover, he will be entitled to compensation for all injuries which naturally resulted from the wrongful acts of the defendant, for the pain and suffering endured by him as a consequence of the injury, if such he suffered, for the loss of time occasioned by his injury; injury to his health, if it has been injured thereby; the pain and suffering and impairment of health and earning capacity, if any, which you may find he will with reasonable certainty suffer in the future. He will also be entitled to recover the reasonable value of his medicines and physician's services.¹

¹ *Rohr v. Columbus Ry. & Lt. Co., et al.*, Franklin Co. Com. Pleas. Kinkead, J.

Sec. 2308. Injury to passenger while assisting driver of street car.

"If the plaintiff was requested by the driver of the car to assist in pushing it back, and in doing so was injured by the negligence or carelessness of the driver of the car on which he had been riding, or of another car, he can recover if such assistance was apparently necessary. Or if there was an actual necessity for him to assist the driver in pushing back the car, and he did so assist, and while doing so was injured by the negligence of the driver of this car or of another, he can recover, whether he was requested by the driver to assist or not."¹

¹ *From Street Railway Company v. Bolton*, 43 O. S. 224.

Sec. 2309. Bound by acts of—Conductor and motorman in scope of employment.

In general the passenger carrier is bound by the acts of its employees and agents in the scope of their employment, and must answer for their negligent or wrongful performance in the scope of their employment. In other words, the negligence of the conductor and motorman of this car, in the scope of their employment, would be the negligence of the defendant company, for which the defendant would be liable, if you find that they, or either of them, were negligent in the performance of their duties as such employees and agents of the defendant, in respect to the negligence charged.¹

¹ Voris, J., in *Sourek v. The Akron St. Ry. Co.*, Summit Com. Pleas. Booth on St. Rys., sec. 372.

Sec. 2310. Reciprocal rights of vehicles and street cars.

In view of the inability of the cars of a street railway company to leave its tracks, it is the duty of free vehicles not to obstruct them unnecessarily, and to turn to one side when they meet them, but subject to that and to the respective powers of the two, a car and a wagon owe reciprocal duties to use reasonable care on each side to avoid collision. Neither has a right to assume that the other will keep out of the way at its peril, although the electric car has a right to demand that the wagon shall not obstruct it by unreasonable delay upon the track.¹

¹ *White v. Ry. Co.*, 167 Mass. 43; *Galbraith v. Ry. Co.*, 165 Mass. 572; *O'Brien v. Ry.*, 186 Mass. 446.

Sec. 2311. Duty of driver of vehicle to look before crossing.

The jury is instructed that it was the duty of plaintiff to look in both directions as he approached ——— street, and to select such a point from which to look as to enable him to determine whether a car was coming, and if the jury find that he did not so look and that his failure so to do contributed to the collision,

then he is guilty of contributory negligence, and he can not recover.¹

¹ Blake v. R. I. Co., 32 R. I. 213, 78 Atl. 834, Ann. Cas. 1912, D. 852.

This may be properly applied in Ohio under peculiar conditions in congested portions of a city.

Sec. 2312. Duty of driver to stop vehicle before crossing track when car approaching, when.

The jury is instructed that if it appears from the evidence that the street car was in sight of the plaintiff, and that it was approaching at a high rate of speed, and if it appears that plaintiff's vehicle was in such close proximity to the track, that, considering the speed of the car and the position of the vehicle, it would appear from such circumstances that ordinary care and prudence would not warrant plaintiff in crossing the track, then it was the duty of the plaintiff to have stopped his vehicle. If he failed so to do, and if the collision was brought about by his own neglect in this respect, he can not recover.¹

¹ Blake v. R. I. Co., 32 R. I. 213, 78 Atl. 834, Ann. Cas. 1912, D. 852;

Moon v. Tr. Co., 237, Mo. 425, 141 S. W. 870, Ann. Cas. 1913, A. 183.

Sec. 2313. Collision between vehicle and street car at street crossing.

1. *Relative rights of driver of vehicle and street railway at street crossing.*
2. *Specific questions of negligence involved.*
3. *Duty of driver of vehicle in exercise of his correlative right.*
4. *Driver of vehicle may assume that motorman will exercise ordinary care.*
5. *Failure of driver to use ordinary care—or if he miscalculates.*
6. *Duty of railway company to drivers of vehicles.*
7. *Motorman observing ordinary care may assume that driver of vehicle will use same care in crossing.*
8. *Alternative findings jury may make.*

1. *Relative rights of driver of vehicle and street railway at street crossing.* The rights of persons driving vehicles in the streets of a city, and of a street railway operating a line of railway in the streets are reciprocal; that is, they are equal. Neither has a superior right, excepting, however, as particular conditions and circumstances appearing in any case may give the one or the other the superior right of passage on a particular occasion. A street railway company owes certain specific duties toward persons driving across its tracks at street intersections. Likewise, persons driving vehicles are bound to take into consideration the nature and manner of the running of cars on the streets of a city, and they must use ordinary care in looking out for their own safety. The driver of a horse must take into consideration in crossing ahead of an approaching street car the fact that the car can not turn out of the course on the tracks; that it must remain on the rails. He is bound to know that the car can not generally be stopped instantly and that the ability to stop the car in order to avoid colliding with him depends upon the rate of speed which it is running when the same is reasonable and not immoderate. A driver has a right to rely upon the observance of the duty that the car will be run at a moderate, reasonable rate of speed, and that it will not be run at an unreasonable and immoderate rate of speed, and that is to be considered in connection with the duty which the law imposes upon a driver of a vehicle in attempting to cross a track in front of an approaching car.

2. *Specific questions of negligence involved.* The specific questions presented by the pleadings and the evidence are whether neither of the parties were at fault and the injury was a result of pure accident, or whether the injury was the result of plaintiff's own negligence, or of that of the defendant. There is no question of the contributory negligence of plaintiff causing the injury. Contributory negligence is a term which is well understood in law, and which the jury might not so readily understand. Such a plea, that is the plea of contributory negligence, when interposed by a defendant, proceeds upon the tacit admis-

sion that the defendant itself was guilty of some negligence and that the neglect of the plaintiff contributed as the direct and proximate cause of the injury. I make this explanation because of the claims of the parties in this case for the purpose of drawing a comparison and illustrating the point clearly to the jury. But understand, gentlemen, that no such plea of contributory negligence is made by the defendant in this case. On the contrary, the plea of the defendant in this case is that it was not guilty of any negligence, and it may substantiate that plea by showing that not only it was not guilty of any negligence, but that the plaintiff was guilty of negligence and that his own negligence was the cause of the injury. So that you can see the difference between a plea of contributory negligence and a claim that the plaintiff was guilty of negligence and that the defendant was not guilty of any negligence.

3. *Duty of driver of vehicle in exercise of his correlative right.* In the exercise of his equal right in the street, that is the plaintiff's keeping in mind as he must do the fact of the nature and manner of running street cars on the rails in the streets of a city, the speed at which they are run when not excessive, as compared with the speed of a heavily loaded wagon, as well as the ability or inability to stop the cars in order to avoid injury, the driver of a vehicle, in the exercise of ordinary care for his own safety, has the right to cross the track of a street railroad even though he observes a car approaching, provided there is a reasonable opportunity for him to cross in the exercise of ordinary care without obstructing the passage of the car unnecessarily; and provided further, that the driver does not undertake to cross the tracks in front of the approaching car in such close proximity to the car at the time he attempts to cross that the motorman may not, if running at a lawful and ordinary rate of speed, be able, by the exercise of ordinary care, to avoid collision with the vehicle.

4. *Driver of vehicle may assume that motorman will exercise ordinary care.* The driver of the vehicle, in attempting to cross the track under such circumstances, and while observing ordinary care, keeping in mind the considerations already mentioned,

has the right to act upon the presumption that the motorman in charge of the car will himself observe ordinary care in the management and control of the car, and that he will, that is, the motorman will, observe the rights of the drivers of vehicles who are in the proper exercise of their reciprocal rights in the streets.

5. *Failure of driver to use ordinary care, or if he miscalculates.* If the driver fails to observe the ordinary care required of him, and by reason of such neglect he miscalculates, or, if he fails to observe the approach of the car and passes in front of the approaching car in such close proximity thereto as that the motorman by the exercise of ordinary care in observing a lookout and while running at a lawful rate of speed, and having the car under reasonable control, can not stop his car in time to avoid the collision and injury, using ordinary care to do so, and the car does not run into the vehicle and injure the driver, the latter can not in such case recover. Now, gentlemen, these are the general doctrines and rules of law which the court gives you as applicable to the facts and circumstances and the respective claims of the parties in this case. The plaintiff may not recover compensation for any damages which he might have avoided by the use of ordinary care under the circumstances. If you find that plaintiff did not observe ordinary care under the rules given you and that by his failure and neglect he exposed himself to the hazards and dangers which ordinary prudence forbid him so to do, or which reasonably ought to have been known to him, and that his own neglect in these respects was the cause of his injury, then he is not entitled to recover and your verdict should in such case be for the defendant.

We come now to the charges of negligence against the defendant.

6. *Duty of railway company to drivers of vehicles.* As already stated, the railway company has equal rights in the streets with the plaintiff, but the railway company in the operation of its cars, owes a duty toward drivers of vehicles who may be crossing its tracks at street intersections when it is in the act of approaching

the same. It is the duty of the railway company, and it was the duty of the defendant in this case in the running of its car upon approaching a street intersection, and the street in question here, or crossing, to run at a lawful and reasonable rate of speed. And it is bound to use ordinary care and prudence in the management and control of its cars, to keep the same under such reasonable control as not to endanger the safety of a person driving a vehicle across the track, the latter using ordinary care at the time. In other words, it is the duty of the railway company to approach the street intersection at such reasonable rate of speed, and the motorman is required to be on the lookout for the welfare and safety of persons driving vehicles at a street crossing, and signals and warnings must be given, and it must use ordinary care in having such reasonable control of the car as may enable it to avoid colliding with vehicles lawfully and prudently passing across the tracks. And if ordinary care requires it under the circumstances, it should check the speed or stop the car. Whether or not ordinary care requires a car to be stopped under a given state of circumstances, or whether the failure to stop the car in time to avoid an injury to a person driving a vehicle by collision under a given state of circumstances, in this case, for instance, is a question of fact entirely within the province of this jury to decide according to the circumstances in this case and by the application of the general doctrines governing the rights and the duties of the parties in this case as given the jury by the court.

7. *Motorman observing ordinary care may assume that driver of vehicle will use same care in crossing.* If the motorman in charge of the car of the defendant was traveling at a moderate and reasonable rate of speed and was at the time observing ordinary care in the operation of the car, and if he had the same under reasonable control, upon sounding the gong and giving warning of the approach of the car, he had the right to proceed to the street intersection for the purpose of crossing the same, and he had the right in such case to assume or pre-

sume that if anyone was approaching the crossing or was nearing and in plain sight of the approaching car, that he would have his vehicle under proper control and would himself exercise ordinary care to avoid collision. He would have the right to presume under such circumstances that the driver would stop so as to avoid collision. The motorman of defendant in this case had a right to assume that the plaintiff would do these things in this case in crossing the track. If, therefore, the motorman was observing the above requirements as to speed and control of the car, if he sounded his gong and warned plaintiff of the approach of the car, and if he acted mistakenly upon such assumption as to what the driver should do, as the court has explained to you, the motorman then in such case can not be said to have acted negligently.

8. *Alternative findings jury may make.* If the defendant was running the car at any excessively high rate of speed, and if he did not have reasonable control of the car, and if he was unable for these reasons to stop the car after seeing the danger to plaintiff in the act of crossing the track in front of the approaching car, and if the collision was due to this neglect on the part of the defendant, then your verdict should be for the plaintiff. On the other hand, if the motorman was not running at an immoderate rate of speed, and if he did have reasonable control of the car and could, by the exercise of ordinary care, approaching car, and he failed under such circumstances to after discovering plaintiff in the act of passing in front of the observe such care and the collision resulted from such failure on the part of the defendant, your verdict should be for the plaintiff. But if, on the other hand, you find that the defendant was running the car at a moderate and reasonable rate of speed, and if the motorman sounded the gong, and if the motorman, when he saw the plaintiff in a place of danger on the track, in the exercise of ordinary care did everything which a reasonably prudent person could do in stopping the car in order to avoid a collision with the plaintiff's wagon, and was unable to do so,

then in such case plaintiff may not recover and the defendant in such case is entitled to your verdict.¹

¹ Schasbarger v. The Col. Ry. & Lt. Co., Franklin Co. Com. Pleas. Kinkead, J.

Sec. 2314. Injury to driver of vehicle at street crossing.

1. *Relative rights of driver of vehicle and street car.*
2. *Relative duties of each.*
3. *When driver may undertake to cross track—His duty.*
4. *Conclusions by jury as to conduct of plaintiff.*
5. *Duty of company to persons crossing street and track as to speed, control of car and signals.*
6. *Conclusion of jury as to conduct of defendant.*
7. *Concurrent negligence of plaintiff.*
8. *Proximate cause.*
9. *Directions as to verdict.*
10. *Traffic ordinance as to passage of vehicles into another street.*

1. *Relative rights of driver of vehicle and street car.* The rights of persons driving vehicles in the streets of a city, and of a street railway operating a line of railway in the streets are reciprocal, that is, they are equal. Neither has a superior right, excepting, however, as particular conditions and circumstances appearing in any case may give the one or the other the superior right of passage on a particular occasion.

2. *Relative duties of each.* A street railway company owes certain specific duties towards persons driving across its tracks at street intersections. Likewise, persons driving vehicles are bound to take into consideration the nature and manner of the running of cars on the streets of a city, and they must use ordinary care in looking out for their own safety. The driver of a horse must take into consideration in crossing ahead of an approaching street car the fact that the car can not turn out of the course on its tracks; that it must remain on the rails. He is bound to know that the car can not generally be stopped instantly, and that the ability to stop the car in order to avoid colliding with him depends upon the rate of speed at which it

is running when the same is reasonable and not immoderate. A driver has a right to rely upon the observance of the duty that the car will be run at a moderate reasonable rate of speed, and that it will not be run at an unreasonable and immoderate rate of speed, and that is to be considered in connection with the duty which the law imposes upon the driver of a vehicle in attempting to cross a track in front of an approaching car.

3. *When driver may undertake to cross track—His duty.* In the exercise of his equal right in the street, the plaintiff, keeping in mind as he must, the facts of the nature and manner of running street cars on the rails in the streets of the city, the speed at which they are run when not excessive, as compared with the speed of a heavily loaded wagon, as well as the ability or inability to stop the cars in order to avoid injury, the driver of a vehicle, in the exercise of ordinary care for his own safety, has the right to cross the track of a street railroad even though he observes a car approaching, provided there is a reasonable opportunity for him to cross in the exercise of ordinary care without obstructing the passage of the car unnecessarily; and provided further, that the driver does not undertake to cross the track in front of the approaching car in such close proximity to the car at the time he attempts to cross that the motorman may not, if running at a lawful and ordinary rate of speed, be able, by the exercise of ordinary care, to avoid collision with the vehicle. The driver of the vehicle in attempting to cross the track under such circumstances, and while observing ordinary care, keeping in mind the considerations already mentioned, has the right to act upon the presumption that the motorman in charge of the car will himself observe ordinary care in the management and control of the car, and that he will, that is, the motorman will, observe the rights of the drivers of vehicles who are in the proper exercise of their reciprocal rights in the streets. If the driver fails to observe the ordinary care required of him, and by reason of such neglect he miscalculates and passes in front of the approaching car in such close proximity thereto as that the motorman, by the exercise of ordinary care in observing a lookout,

and while running at a lawful rate of speed, and having the car under reasonable control, can not stop his car in time to avoid the collision and injury, using ordinary care to do so, and the car does run into the vehicle and injure the driver, the latter can not, in such case, recover.

4. *Conclusions by jury as to conduct of plaintiff.* Now these, gentlemen, are the general doctrines and rules of law which the court gives you as applicable to the facts and circumstances and respective claims of the parties in this case. The plaintiff may not recover compensation for any damages which he might have avoided by the use of ordinary care under the circumstances. If you find that plaintiff did not observe ordinary care and the rules of law given you, and that by his failure and neglect he exposed himself to the hazards and dangers which ordinary prudence forbid him so to do, or which reasonably ought to have been known to him, and that his own neglect in these respects was the cause of his injury, then he is not entitled to recover, and your verdict would in such case be for the defendant.

5. *Duty of company to persons crossing street and track as to speed, control of car, and signals.* We come now to the charges of negligence made by the plaintiff against the defendant. As already stated, the railway company has equal rights in the streets of a city, but the railway company, in the operation of its cars, owes a duty towards travelers and vehicles who may be crossing its tracks at street intersections when it is in the act of approaching the same. It is the duty of the railway company, and it was the duty of the defendant in this case in the running of its cars, upon approaching the street intersection or crossing, to run at a lawful and reasonable rate of speed, and it was bound to use ordinary care and prudence in the management and control of its cars, to keep the same under such reasonable control as not to endanger the safety of a person driving a vehicle across the track, the latter using ordinary care at the time. In other words, it is the duty of the railway company to approach the street intersection at such reasonable rate of speed, and the motorman is required to be on the lookout for

the welfare and safety of persons driving vehicles at a street crossing, and signals and warnings must be given, and it must use ordinary care in having such reasonable control of the car as may enable it to avoid colliding with vehicles lawfully and prudently passing across the street, and if ordinary care requires it under the circumstances, it should check the speed or stop the car. Whether or not ordinary care requires a car to be stopped under a given state of circumstances, or whether the failure to stop the car in time to avoid an injury to a person driving a vehicle by collision under a given state of circumstances, in this case, for instance, is a question of fact entirely within the province of this jury to decide according to the circumstances in this case, and by the application of the general doctrines governing the rights and the duties of the parties in this case as given the jury by the court. If the motorman in charge of the car of the defendant was traveling at a moderate and reasonable rate of speed, and was at the time observing ordinary care in the operation of the car, and if he had the same under reasonable control, upon sounding the gong and giving warning of the approach of the car, he had the right to proceed at the street intersection for the purpose of crossing the same, and he had the right in such case to assume or presume that if any one was approaching the crossing, or was near it and in plain sight of the approaching car, that he would have his vehicle under proper control and would himself exercise ordinary care to avoid collision. He would have the right to presume under such circumstances that the driver would stop so as to avoid collision. The motorman of defendant in this case had the right to assume that the plaintiff would do the same in this case in crossing the track.

6. *Conclusion of jury as to conduct of defendant.* If, therefore, the motorman was observing the above requirements as to speed and control of the car, if he sounded his gong and warned plaintiff of the approach of the car, and if he acted mistakenly upon such assumption as to what the driver should do, as the court has explained to you, the motorman then in such case can not be said to have acted negligently. If the defendant

was running the car at an excessive rate of speed, and if he did not have reasonable control of the car, if he was unable for these reasons to stop the car after seeing the danger to plaintiff in the act of crossing the track in front of the approaching car, and if the collision was due to this neglect on the part of the defendant, then your verdict should be for the plaintiff. On the other hand, if the motorman was not running at an immoderate rate of speed, and if he did have reasonable control of the car and could, by the exercise of ordinary care, have discovered plaintiff in the act of passing in front of the approaching car, and he failed under such circumstances to observe such care, and the collision resulted from such failure on the part of the defendant, your verdict should be for the plaintiff. But if, on the other hand, you find that the defendant was running the car at a moderate and reasonable rate of speed, and if the motorman sounded the gong, and if the motorman, when he saw the plaintiff in a place of danger on the track, in the exercise of ordinary care did everything which a reasonably prudent person could do in stopping the car in order to avoid a collision with the plaintiff's wagon, and was unable to do so, then in such case plaintiff may not recover and the defendant in that event is entitled to your verdict.

7. *Concurrent negligence of plaintiff.* Some claim is made in evidence and argument that if it should appear from the evidence that the defendant was guilty of some negligence as charged, that the plaintiff himself was also guilty of negligence which was concurrent with any negligence of which the jury as to this matter in the requests made by the defendant before argument, and it will now further say to you, that if you find that both plaintiff and defendant were guilty of negligence, and that the negligence of both was contemporaneous and continuing until after the injury, and that the negligence of each was a direct cause of the injury, without which it would not have occurred, plaintiff may not recover, and your verdict should be for the defendant. But if you find that the negligence of the plaintiff, if he was guilty of negligence, was not contemporane-

ous and continuing, as stated, you will then determine whether the negligence of plaintiff or of the defendant was the proximate cause of the injury.

8. *Proximate cause.* The law regards only the proximate cause, attaching legal consequences thereto. Consequently the jury must understand the meaning of the term.

The proximate cause of an injury is that cause which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which the injury would not have occurred.

9. *Directions as to verdict.* Under the rules given you concerning the alleged negligence of both plaintiff and defendant, the jury is instructed that if you should find that the plaintiff was guilty of negligence in any of the particulars charged, and the defendant was also guilty of negligence, but that the negligence of plaintiff was not contemporaneous nor continuing with that of the defendant, and that the plaintiff's negligence, without the intervention of the negligent acts of the defendant would not have produced the injury, and that the negligence of the defendant in such case was a new and independent cause, without which the injury would not have occurred, and that the same produced the injury, your verdict should be for the plaintiff.

But if you find that the negligence of the plaintiff was not concurrent with that of the defendant, that there was no intervening, new or independent negligence of the defendant, producing the injury, your verdict should be for the defendant.

10. *Traffic ordinance as to passage of vehicles into another street.* A traffic ordinance passed by the city council of the city of Columbus, regulating the conduct of drivers of vehicles upon the streets of the city, has been offered in evidence, the provisions of which require vehicles turning to the left into another street, alley or thoroughfare, shall pass to the right of and beyond the center of the street intersection before turning, and other provisions which have been offered in evidence and read to you.

This ordinance is permitted to go to you as evidence touching the question of the conduct of the plaintiff, which it is claimed constitutes negligence on his part, and may be considered by

you on the question whether the plaintiff acted prudently or not in crossing the street under the circumstances as shown in the evidence. The judgment or opinion of the authorities of the city of Columbus in passing this ordinance, prescribing what they may deem to be a proper rule of conduct governing parties in such cases, is not as matter of law conclusive upon your judgment in determining the questions of fact in this case. If, however, it coincides with your opinion as to the true measure of standard of conduct to be exacted of drivers of vehicles in such cases and under the circumstances of this case, you may adopt it and act upon it in the rendition of your verdict. But if you believe from all the evidence in the case that it does not prescribe the proper rule or standard of conduct which should be applied to the circumstances in this case, you may exercise your own judgment in the matter.¹

¹ Jaeger v. The Columbus Ry. & Lt. Company, Franklin Co. Com. Pleas. Kinkead, J. Effect of violation of ordinance, Meek v. Penn Co., 38 O. S. 632; Hoppe v. Parmalee, 20 C. C. 303.

Sec. 2315. Injury to passenger in hired automobile from collision between street car and automobile—By joint negligence of both—Action against both.

1. *Statement of negligence charged.*
2. *Neither defendant liable for negligence of other—Both liable if their concurrent negligence cause injury.*
3. *Plaintiff must be free from negligence—Rule and burden of proof.*
4. *Negligence—Duty of motorman and driver of automobile.*
5. *Reciprocal rights and duties of each.*
6. *Same—Duty as to discovery of intent of auto driver to cross street.*
7. *Directions as to verdict.*
8. *Duty of driver of auto to plaintiff as its passenger in crossing track—Whether to look and listen.*
9. *Negligence of auto driver not imputable to plaintiff.*
10. *Ordinance as to operation of cars and autos.*
11. *Statute as to speed of auto.*

12. *Summary and direction as to verdict.*

13. *Damages.*

1. *Statement of negligence charged.* The jury will note that the defendants are not both charged in the plaintiff's amended petition with the same acts of negligence, but it is charged as against the railroad company that it was negligent in that the said street car was being operated and run at a high and dangerous rate of speed; that the motorman in charge of said car did not check the speed of the same at said street intersection where said collision occurred; that no signal or warning was given of the approach of said car; that the motorman of said car negligently and carelessly failed to have said car under control at said street intersection, and failed and neglected to stop said car when he saw, or by the exercise of ordinary care could have seen the automobile in which the plaintiff was a passenger.

And the defendant, S., and his partner were charged to be negligent in that the operation of said automobile carelessly and negligently failed to keep a proper lookout for said approaching car and negligently and carelessly propelled said automobile in the car track in front of said car.

2. *Neither defendant liable for negligence of other—Both liable if their concurrent negligence cause injury.* The court instructs you that neither of the defendants can be held liable for the negligent act or acts charged against the other, but each defendant is to be held liable for the negligent act or acts, if any are proved, which are charged against each of such defendants.

You may, if the evidence justifies it, find for or against one or both of the defendants. Before, however, you will be warranted in finding against both of the defendants, you must find that the injuries of which she complains resulted by reason of one or more of the acts of negligence of one defendant combined with one or more acts of negligence of the other defendant producing the injury; in other words, concurrent acts of negligence of both defendants and producing the injuries are essen-

tial to render both liable; and not the several negligent acts, if any, of one defendant.

3. *Plaintiff must be free from negligence—Rule and burden of proof.* Again, before the plaintiff can recover it is essential that she be free from negligence on her part producing, or contributing to, her injuries. And the rules of proof with regard to her contributory negligence, if any, are these: The burden of proof rests upon the defendant to show that she was guilty of contributory negligence, with this qualification, that if the evidence adduced by her raises a presumption that she was negligent and that such negligence contributed to produce the injury, the burden rests upon her to remove that presumption; for the law is that when the circumstances require of plaintiff the exercise of due care to avoid the injury, and plaintiff's own negligence directly contributes to her injury, she can not recover on account of the negligence of defendants, for the law will not undertake to apportion the degree of negligence as between the parties.

4. *Negligence—Duty of motorman and driver of automobile.* Negligence is defined to be the want of ordinary care, that is, such care as an ordinarily prudent person would exercise under the same or similar circumstances and surroundings. Ordinary care depends upon the circumstances of each particular case, and should be commensurate with the danger reasonably to be apprehended from a lack of proper prudence. This definition of negligence applies to both plaintiff and the defendants, and will be used by you in determining whether either of the parties was negligent.

It was the duty of the motorman of the railway company in the operation of its car at the intersection of these two streets as well as it was the duty of the driver of the auto in the operation of the auto at this point, to exercise that degree of care which an ordinarily prudent and careful person would exercise under like circumstances, to avoid danger of collision at the crossing. And neither the motorman of the railway company nor the driver of the auto had the right to operate their respec-

tive conveyances at the street crossing in such a manner as to throw all the burden of care and watchfulness to avoid accidents upon the other. It was the duty of each to exercise ordinary care and vigilance to avoid accident to the other.

5. *Reciprocal rights and duties of each.* The driver of the automobile and the street railway company had an equal right to use the streets at the intersection, the driver of the auto, however, making due allowance for the fact that the street car ran upon a fixed track and by reason of its greater weight was less easy to check or stop than the automobile. With this difference in the mode of use, their rights were mutual and reciprocal in the use of the streets at their intersection. A duty to be on the lookout to avoid danger was just as fully imposed upon the one as upon the other, and it was the duty of each to operate their car and auto respectively with reference to the mutual and reciprocal rights of the other using the streets at the crossing. The only different right which the street car company had, arose from the necessity of the car confining its travel to the tracks, and the consequent inability to turn out to avoid collision.

6. *Same—Duty as to discovery of intent of driver to cross street.* If the street car was being operated in a much frequented part of the city, and the motorman discovered, or by the exercise of ordinary care should have discovered that the driver of the automobile was about to cross the track at the crossing in front of the car, it was the motorman's duty to use ordinary vigilance to stop or check the car in order to avoid a collision; and if he did not exercise such vigilance, and by reason thereof the collision occurred, you will be justified in finding that the railroad company was negligent. Under like circumstances, if the driver of the automobile, being about to make the crossing, discovered or by the exercise of ordinary care should have discovered that the street car was about to cross at the intersection of the two streets in front of the automobile, it was the duty of the driver of the automobile to use ordinary vigilance to stop or check his machine in order to avoid the collision, and if he did not exercise such vigilance, and by reason

thereof the collision occurred, you will be warranted in finding that the defendant, S., was negligent.

7. *Directions as to verdict.* On the other hand, if the motor-man of the railway company and the driver of the auto, or either of them, did exercise that degree of care and vigilance in operating their respective means of conveyance, as they approached and were about to go over the intersection of these two streets, you will be justified in finding that the defendant or defendants so exercising such care and vigilance were not negligent.

You will, therefore, consider the evidence adduced and determine, so far as the railway company is concerned, whether or not it was negligent in operating its car at this intersection at a high and dangerous rate of speed, or whether or not the motorman slackened the speed of the car, or gave any signal or warning of his approach, or negligently failed to stop the car when he saw, or by the exercise of ordinary care could have seen the automobile in time to have avoided the collision. If you resolve all of these questions in favor of the defendant company you will find it not negligent, and your verdict will be for the defendant railway company. But if you determine from a preponderance of the evidence any one or more of these questions in favor of the plaintiff and against the defendant company, you will be justified in finding that the defendant railway company was negligent.

You will also consider the evidence adduced, and determine, so far as the garage company is concerned, whether or not the operator of the auto was negligent in that he failed to keep a proper lookout for the approaching car, or carelessly and negligently propelled his automobile on the car track in front of the said car. If you determine both of these questions in favor of the garage company you will find that S. was not negligent and your verdict will be for the defendant, S. But if you determine one or more of these questions in favor of the plaintiff and against the defendant, S., you will be warranted in finding that S. was negligent.

8. *Duty of driver of auto to plaintiff as its passenger in crossing track—Whether to look and listen.* The court further instructs you that the plaintiff being a passenger for hire in the auto, it was the duty of the auto driver to exercise ordinary care for her safety while she was such passenger. And while omission by a driver of an auto about to drive across the street railway tracks to look for an approaching car is not in all cases, as a matter of law, negligence, it nevertheless is his duty to exercise ordinary vigilance to avoid a collision with the car; and whether the driver of the auto exercised such vigilance or not depends upon the circumstances and surroundings of the case. If at the time he was about to cross the track, the situation and circumstances then surrounding him were such as to require a person in the exercise of ordinary prudence to look and listen to ascertain whether there was a car approaching and in close proximity to the crossing, and he failed to do so, then he was negligent. On the other hand, if the circumstances were not such as to require him to look or listen, he would not be negligent.

In considering the question of negligence on the part of the auto driver, as charged, you will therefore look to all the facts and attendant circumstances and determine whether they were such as to require the driver to look for an approaching car as he was about to cross the track, and to listen for signal or warning, if any, of the car's approach. If you determine that under all the circumstances it was his duty in the exercise of ordinary prudence, to look or listen, or do both, as he approached, and he did not do so, you will be warranted in finding that the driver was negligent. On the other hand, if the circumstances did not require him to look or listen on approaching the track before he crossed, you will be justified in finding he was not negligent.

9. *Negligence of auto driver not imputed to plaintiff.* While the negligence, if any, of the automobile driver is not imputable to the plaintiff as a passenger, and while she was not required to exercise the same watchfulness as the driver to avoid danger, she could not rely implicitly on the care of the driver, when in

a position to see and apprehend the danger, if any, but it was necessary for her to exercise ordinary care for her own safety, and if she did not do so, and in consequence of her failure to exercise such care she was injured, she cannot recover, even though both or either of the defendants were negligent as charged in the amended petition, and such negligence contributed to produce the injuries.

10. *Ordinance as to operation of cars, and autos.* Certain provisions of an ordinance under which it is claimed the street railway company was operating its cars on Jaeger street have been offered in evidence, relative to the speed of the cars, their control, the degree of watchfulness required of the company, and the like, at crossings; and evidence has been offered tending to show that the company was violating these provisions at the time of the accident. Whether or not any of the foregoing matters have been sufficiently shown by the evidence are matters of fact for your determination, of which the court has nothing to do. However, the court instructs you that the violation, if at all, of such ordinance is not as matter of law, conclusive evidence of negligence on the part of the railway company, but is only a circumstance taken in connection with all other evidence reflecting upon the company's alleged negligence, if any.

Furthermore, provisions of an ordinance have also been offered in evidence relative to the mode of travel on the public streets by automobiles and other vehicles, and how they shall turn at intersections to go from one street into another, and it is claimed that the automobile driver was violating this ordinance in failing to turn to the right of the center as he was about to go from one street to the other. It is your province to determine whether or not he was at the time of the accident violating this ordinance, and circumstance to be considered by you along with all the negligence on the part of the automobile driver, but was a fact and, if he was, such violation was not conclusive evidence of other evidence in the case reflecting upon the question of his alleged negligence, if any.¹

¹ Meek v. Penn. Co., 38 O. S. 632.

11. *Statute as to speed of auto.* The statutes of this state also declare, in substance, that whoever operates a motor vehicle on the public roads or highways at a speed greater than is reasonable or proper, having regard for width, traffic, use and the general and usual rules of the road or highway, or so as to endanger the property, life or limb of any person, shall be guilty of a misdemeanor.

The statute also declares that whoever operates a motor vehicle at a greater speed than eight miles an hour in the business and closely built up portions of a municipality, or more than fifteen miles an hour in other portions thereof, is guilty of a misdemeanor.

Evidence has been offered tending to show that at the time of the accident the driver of the automobile, was violating these provisions of the criminal law, and other evidence is offered tending to show that neither of these statutes was being violated. Whether or not the evidence so shows is a matter of fact for your determination and not a matter for the court to pass upon. Acts in violation of such statutes, in the absence of countervailing testimony is *per se* negligence and constitutes a *prima facie* liability. But this, of course, is not conclusive; where there is testimony tending to show that the acts of excessive speed did not in fact proximately cause the injury, it is for the jury to determine what did in fact cause the injury.

12. *Summary and direction as to verdict.* In summing up, the court instructs you that if you find that the defendants or either of them were negligent in one or more of the particulars alleged in the amended petition; that the separate negligence of one defendant, or the combined and concurrent negligence of both defendants directly produced the injuries or some of them complained of; and that no act of negligence on the part of plaintiff produced, or contributed to produce her injuries, or any of them, it will be your duty to find a verdict for the plaintiff against the defendant or defendants whose negligence produced such injuries.

On the other hand, if you find that neither of the defendants was negligent, or if negligent, that such negligence did not pro-

duce the injuries to plaintiff, or that the plaintiff herself was negligent and such negligence either produced, or contributed along with the negligence of either or both of the defendants to produce the injuries, you will return your verdict for the defendants.

13. *Damages.* If you find that the plaintiff is entitled to recover, your verdict should be in her favor for such sum as damages as will fairly and justly compensate her for the injuries; the measure of her damages is compensation and only compensation. You will take into consideration the nature of the injuries, the extent of them, the pain which she has suffered, all the necessary expense which she has necessarily been put to in consequence of the injuries. You will consider the effect of the injuries, the permanency of it, the effect of the injuries upon her bodily strength and upon her capacity to labor and earn a living, and all the other facts and circumstances, calmly and deliberately, and apply your judgment to the evidence in the case. If you find in favor of the plaintiff, you will award her such damages as will fairly and justly compensate her for the injuries, not to exceed, however, the amount claimed in the petition.¹

¹ *Kelly v. Cols. Ry. & Light.* Franklin Co. Com. Pleas. Rogers, J.

Sec. 2316. Street car colliding with automobile stalled on track on dark night.

1. *The charge of negligence.*
2. *Duty of railway company when automobile stalled on track on dark night.*
3. *Same—Duty on discovery of auto on track to use ordinary care.*
4. *Duty of person in charge of automobile.*
5. *If auto driver negligent—To hold railway company, it must be guilty of new and independant act of negligence.*
6. *Speed of car—Opinion of witnesses to be received with caution.*
7. *Form of verdict.*

1. *The charge of negligence.* The charge of negligence contained in the petition is that defendant was running at a high

rate of speed of about thirty miles an hour, and that it carelessly, recklessly and negligently ran into the automobile. The last allegation, that the defendant carelessly, recklessly and negligently ran into the automobile, is a general charge of negligence, it does not specify particularly the ground of negligence claimed. But it is sufficient to allow the case to be tried and to go to the jury, and the court will direct your attention to the particular claims that are made in the evidence, even though they are not specifically specified in the petition.

The conceded fact upon which the claim of negligence in this case is based is, that the automobile of plaintiff had stopped on the track of the defendant at about midnight, on a dark night, at a street intersection at which point the street light was out. The driver of the auto looked backwards and became aware of the approach of the street car a square away while the auto was still stalled or standing on the track. There were four men in the auto, and whoever made the effort to start the car was unable to start it; that is, was unable to start the engine; and the evidence is undisputed that no effort was made to remove the car in any other way than by its own power. It is undisputed that a police officer was present and that he endeavored to signal the approaching car to stop. The question of where he stood, how many feet away from the auto he was, is a question which the jury must decide.

On the basis of the conceded facts stated, the jury will determine whether the injury was an accident; that is, whether it was without anybody's fault, and for which there is no legal responsibility, or whether it was caused by the negligence of the defendant, or whether it was caused by the negligence of the servant or agent of the plaintiff who was in charge of the car.

2. *Duty of railway company when automobile stalled on track on dark night.* Where an automobile is standing still on the track of a street railway which cannot be quickly or readily removed therefrom by its own power because of the inability of the person in charge of it to start the engine, and where the night is dark, and the street light at the street intersection where

the auto is standing is not burning, it is the duty of those in charge of a street car which is being run along the street car track at such place, to use ordinary care in keeping an outlook to discover the presence of persons in such automobile and upon the track ahead of the car. And if the servant in charge of the street car, in the exercise of ordinary care under the particular conditions appearing from the evidence, is unable to discover an automobile in a position of danger on the tracks, and by the exercise of ordinary care such servant of the defendant is unable to discover the automobile standing on the track ahead of the car and collides with the same, there can be no liability on the part of the defendant.

Now that rule of liability, gentlemen, you will observe is dependent upon the ultimate fact of whether ordinary care was used by the servant of the railway company in discovering the perilous position of the auto. And that is the fact for the jury to find. The court merely states the rule of care to be required of the motorman, which is to be applied by the jury.

3. *Same—Duty on discovery of auto on track to use ordinary care.* The defendant railway company may be held liable for colliding with an automobile standing on its tracks, as the one in this case was, and under such conditions as appear from the evidence in this case, only if it fails to observe either one of two duties or obligations which the law imposes upon the company. First: if it fails to observe ordinary care to discover persons and vehicles or autos in a position of danger on its track, and by reason of such want of care on its part, its car runs into such vehicle or auto, it is liable therefor, if its negligence in this respect is the sole, or proximate cause of the collision and injury.

Second: if the servant, or the motorman in charge of a street car, exercising due and ordinary care actually discovers a person and vehicle or auto on the track in a position of danger, whether such dangerous position of the vehicle is due to pure accident on the part of the person in charge of the auto, or whether it is due to his negligence in allowing it to remain on the track, then it becomes the duty of the railway company to

observe such ordinary care to avoid injury by collision with the auto by either slacking the speed or by stopping the car.

The law places the responsibility upon a motorman of avoiding injury,—that is, of using ordinary care in avoiding injury after he discovers the auto in a position of danger. The evidence is undisputed, however, that a policeman gave a signal, but the motorman states that he endeavored to stop and did stop the car after he saw the policeman, and that he did not see anything else but the police officer. Those are the items in evidence to which the jury must affix legal consequences, if there are any to be applied. The rule of law applicable to the situation disclosed in the evidence is that after the motorman saw the policeman from the car,—whether he observed the signal or whether he did not,—it was his duty to observe ordinary care in the management of the car and by the use of the facilities which he had at hand to use reasonable care to stop the car. If it should appear to the jury that by the exercise of ordinary care, and in the use of the appliances at hand, he could have stopped the car in time to have avoided the collision with the auto, and he failed to do that, then there would be a liability. But if after seeing the police officer the motorman exercised due care and used all of the appliances that he could and did all that he reasonably could under the circumstances and was unable to stop the car, and did not see the auto, nor the light thereon, and was unable by the exercise of due care to stop the car in time to avoid the collision, then the company may not be held liable for the injury.

4. *Duty of person in charge of automobile.* The attention of the jury is directed to the conduct of the servant or agent in charge of the automobile. It was the duty of such servant or agent when he found that his machine would not readily move by the power of its engine, to take such steps with the means at hand for the protection of the machine from probably collision with the street car,—especially when he knew that the car was approaching,—as ordinary care and prudence required, considering the conditions, the darkness of the night, the number of persons in company with the servant of the plaintiff, their

knowledge of the approaching car, the ability of the persons present to move the car from the tracks.

5. *If auto driver negligent*—*To hold railway company, it must be guilty of new and independent act of negligence.* If it should be concluded by the jury that the servant of plaintiff was negligent and careless in the handling of the machine and in protecting the same from collision, to hold the defendant liable for the injury in such case it must be established by the evidence that the defendant company introduced into the situation a new and independent act of negligence without which there would have been no injury committed, and such act must be regarded by you as the proximate cause of the collision or injury.¹

In other words, if plaintiff was guilty of negligence,—that is, if plaintiff was guilty of negligently having the machine on the tracks and the jury should find that the motorman could or ought to have discovered the peril of the machine, or, that having discovered its position that he failed to use ordinary care to avoid the collision by stopping the car, then either the act of failing to discover the peril of the auto, or the failure to use ordinary care to stop the car after discovering it, or after being signaled, would constitute an independent act of negligence. But either failure of defendant to discover the machine, or failure to use ordinary care to stop its car after being signaled must be the proximate cause of the injury in order to hold it liable. If the defendant company's motorman was unable by the exercise of ordinary care to discover the auto on the track, or if he was unable after being signaled by the officer by exercising ordinary care to stop the car, then the company was not guilty of any negligence and is not liable for the injury.

Negligence as applied to both parties in this case is the failure of either to exercise ordinary care under the circumstances in the case. In deciding the question whether the defendant exercised ordinary care or was negligent, the jury may consider the claim made by the parties concerning the speed of the car, whether it was excessive or not, whether it had any material

bearing on either the want of care or the exercise of due care on the part of the defendant.

6. *Speed of car—Opinion of witnesses to be received with caution.* On this question the jury may consider the ordinance of the city and the opinions of the witnesses concerning the speed. As the opinion of non-expert witnesses,—that is, those who have no special knowledge of the speed of street cars, may be formed with little observation and scant opportunity to observe the rate of speed at which a car is claimed to have been running, the jury should receive and consider such evidence with caution and circumspection. If it should appear to the jury that the *res gestae*,—that is, the transaction presented by the case,—renders an opinion as to speed impossible, or highly improbable that the estimate or opinion given is correct, the jury may in its discretion, reject it. Estimates of speed are so regarded in the law as not to be of such character of evidence as to be considered in that which is regarded as contradictory, or such as to be considered on the question of the credibility of witnesses; that is, in case of conflicting statements. That means one witness may give one estimate and one witness will give another estimate, and in hearing and considering the question of credibility, the jury would not be warranted in considering that the credibility of any witness was affected by any expression of opinion as to the speed of a car. The court merely gives you these precautionary instructions concerning your duty, and the matter is entirely within your judgment and discretion, as you are the sole judges of the facts.²

7. *Form of verdict.* The court has now given the rules of law applicable to the claims of each party to the action. If the jury find that the defendant failed to use ordinary care, and by reason of such failure did not discover the auto on its track, or if it did not observe ordinary care after being signaled, and such negligence was the cause of the injury, your verdict should be for the plaintiff, and in such case you will assess him such damages as will be measured by the nature of the injury as appears in the evidence.

If you find that defendant was not guilty of negligence in either of the respects mentioned, your verdict should be for the defendant. If you find that the injury was caused by pure accident, or if you find that the collision was caused by the sole neglect of the servant of the plaintiff in charge of the car, and that the defendant railway company was not guilty of any negligence in the matter, your verdict should be for the defendant.³

¹ *Nehring v. Connecticut Co.*, 84 Atl. 301 (Conn.), 8 St. Ry. Rep. 489.

² *Nicholson v. Scioto Valley Tr. Co.*, 14 N. P. (N.S.) 177, 188; *Happe v. Railway*, 61 Wis. 357; *Moore on Facts*, sec. 120; *Central of Ga. Ry. v. Waxelbaum*, 111 Ga. 812.

³ *Gregg v. Columbus Railway & L. Co.*, Franklin Co. Com. Pleas. *Kinkad, J.*

Sec. 2317. Duty of motorman on meeting horse coming in opposite direction becoming frightened.

The jury is instructed that the rights of the driver of a horse and of the manager of an electric car meeting upon a highway are equal and each must use the way with a reasonable regard for the safety and convenience of the other.¹

The motorman in charge of such car, when running it at the ordinary rate of speed, is not required to stop or lessen the speed of the car when observing that a horse approaching from the opposite direction is frightened, unless the circumstances are such as to indicate that the horse has or probably will become unmanageable upon the approach of the car, and that the driver or persons with him are or will be put in imminent danger and peril.²

¹ *Ellis v. Railway*, 160 Mass. 341.

² *Railway v. Houston*, 9 C. C. (N.S.) 408; see *Benjamin v. L. & B. Ry. Co.*, 160 Mass. 341; *Benjamin v. Holyoke St. Ry.*, 160 Mass. 3.

Sec. 2318. Duty of driver of wagon in crossing track at street crossing—Ordinary care—Look and listen.

The jury is instructed that the law does not require one who is about to drive a team [or automobile] across a street car track at a street crossing to stop, or to look and listen for an

approaching car in the same manner as when crossing the track of a steam railroad. The rule of conduct which applies to and governs such a driver is that he shall use ordinary care in driving across the track. Such care must depend upon the conditions and circumstances of the particular case. If they are such as would require a prudent and careful person to stop and look, then he should do so before crossing. If he failed to do so, he would be negligent. If the circumstances are such that an ordinarily prudent person would be warranted in passing across the tracks without stopping or looking, then he would not be guilty of negligence for failing so to do.

The question is for the jury to determine from all the facts and circumstances.

So, therefore, if the jury finds, etc.

Sec. 2319. Duty of driver of vehicle about to cross track at street crossing—Ordinary care only required.

The rule of care which the law exacts of one who is about to drive across the track of a street railway crossing, is that he shall use ordinary care for his own safety, such care as reasonably prudent persons would or should ordinarily use under the same or similar circumstances. The rule of looking and listening as required when crossing steam railroads does not apply. And it may not always be required that such driver shall look and listen for an approaching car. The degree of caution or watchfulness will depend upon the circumstances. Ordinary care requires that he should use his faculties for his own protection and safety.¹

¹ *Traction Co. v. Brandon*, 87 O. S. 187; *Street Ry. v. Westenhuber*, 22 C. C. 67; *affd.* 65 O. S. 567; *Railway v. Kiner*, 17 C. C. (N.S.) 431; *Railway v. Snell*, 54 O. S. 197.

Sec. 2320. Driver of vehicle arriving at street crossing in advance of street car has prior right to cross.

The jury is instructed that the driver of a vehicle arriving at a street crossing in advance of a car has the prior right to

cross the track of the railway company. While he is in the act of crossing he may assume that the approaching car is being operated in a careful and prudent manner and is under reasonable and proper control, and that its speed does not exceed that fixed by municipal ordinance. Such driver has the right under such circumstances to proceed to cross the track even though in doing so may require that the speed of the car be reduced or slackened, or even though it might require that the car be brought to a full stop to avoid a collision.¹

¹ *Mansfield Ry. L & P. Co. v. Kiner*, 17 C. C. (N.S.) 431: court of appeals.

The foregoing is a strong statement of the law, too stringent for the larger cities of the state. Under the new system, however, a rule applied in a small city becomes the supreme law for the larger cities. To say generally that a vehicle arriving in advance of a car has a prior right without further detail of circumstances or conditions is hardly a fair rule to be applied in many cases arising in cities. See *Carrabar v. Railway*, 198 Mass. 549, 85 N. E. 162, 126 Am. St. 461.

Sec. 2321. Relative rights of street car and driver of vehicle at street crossing.

The jury is instructed that the driver of a vehicle and of a street railway company at a street crossing each have an equal right to use the street at such point. This right is subject to the qualification that due allowance is to be made for the fact that the car runs upon a fixed track, and by reason of its greater weight it is less easy to stop than the smaller vehicle. The different right which the railway company has arises from the necessity of the car confining its tracks, and the consequent inability to turn out to avoid collision.

The law imposes a duty on the motorman operating a street car to be on the lookout, as it does upon the driver of another vehicle. Furthermore, the duty is imposed on the company to so operate its cars, by the exercise of reasonable care, as to keep them under ordinary control at street crossings in order

thereby to avoid injury to those first reaching the crossing and exercising their right to cross.¹

¹ Traction Co. v. Brandon, 87 O. S. 187. See *Railway v. Hunter*, 10 C. C. (N.S.) 564, for a different form of request, a part of which was approved.

Sec. 2322. Duty of motorman to discover vehicle about to cross track and avoid injury.

Where the motorman of a street car which is being operated on a public street in a much frequented part of the city, discovers, or by the exercise of ordinary care and watchfulness should discover, that the driver of a smaller vehicle is about to cross the track at a street crossing, in front of such car, it is the motorman's duty to use ordinary care and vigilance to stop or check the car in order to avoid a collision.¹

¹ Traction Co. v. Brandon, 87 O. S. 187.

Sec. 2323. Contributory negligence of children at crossings.

It was the duty of the decedent (or plaintiff) to conduct herself with ordinary prudence and care in passing over the railroad crossing, such prudence and care as was commensurate with the existing dangers known to her, or that reasonably ought to have been known to her under the then existing circumstances, such as a child of her age would ordinarily exercise under like circumstances. If she knew or had sufficient judgment to appreciate the hazards of the railroad crossings, and undertook to cross the same while the trains of said company were passing upon its tracks near and over said railroad crossing, she took upon herself the risks incident thereto, but her conduct should not be judged by the same rule as that of adults. And while it was her duty to exercise ordinary care and prudence to avoid the injury complained of, ordinary care for her would be that degree of care which children of the same age of ordinary care and prudence are accustomed to exercise under similar circumstances. All her conduct is to be treated in this light. * * *

If you find by a preponderance of the evidence that the decedent was so guilty of negligence that directly contributed to her death, the plaintiff can not recover, for it was the duty of the decedent,

at the time of her decease, to exercise ordinary care and prudence, and care and prudence of a child of her years and understanding, under all the circumstances then known to her, or that reasonably ought to have been known to her.

But if you do not find her guilty of contributory negligence, and you do find under these instructions that the defendant was guilty of negligence herein defined and limited, your verdict should be for the plaintiff, and for such amount of damages as you shall find under the instructions given you upon that subject.¹

¹ Voris, J., in *Gaston v. Lake Shore R. R. Co.*, Lorain Co. Com. Pleas.

Sec. 2324. Presumption of negligence from collision—Burden cast on defendant.

The jury is instructed that where a passenger, in an action against a street railway company, shows that he was injured as the result of a collision at a railroad crossing with a railroad train, the presumption arises that the collision was due to the negligence of the company, thereby throwing the burden on the company to show that the collision was not due to its negligence.¹

¹ *Parker v. Railway*, 153 Iowa. 254, 133 N. W. 373, Ann. Cas. 1913, E. 174; *Osgood v. Traction Co.*, 137 Cal. 280.

Sec. 2325. Prima facie negligence from collision.

If you find from the evidence that plaintiff took passage in one of defendant's cars to ride from —— to ——, and while thus riding in the car of the defendant company, and without negligence on her part, a car of the defendant company on the same track, running at a high rate of speed, collided with the car upon which the plaintiff was riding, and from such collision she was injured, a *prima facie* presumption of negligence arises against the defendant company, and that such presumption must be explained away or accounted for by the defendant before it

can absolve itself from the liabilities arising from this presumption of negligence.¹

¹ Gillmer, J., in *Klipp v. Trumbull Electric Railroad Co.* See Booth on St. Rys., secs. 323, 361; *North Chicago St. Ry. v. Colton*, 29 N. E. Rep. 899, 32 Minn. 1.

The degree of care which should be exercised to avoid collisions is such watchfulness and precaution as are fairly proportioned to the dangers to be avoided, judged by the standard of common prudence and experience. *Id.*, sec. 309.

Sec. 2326. When person signals car intending to board it is to be treated as passenger.

The negligence charged in the petition is that, after signaling the car to stop for the purpose of boarding it, the car did stop at the point named in the petition, and that as plaintiff had taken hold of the handle bar and had started to board the car the defendant company did not give the plaintiff sufficient time to get on the car, but that the conductor negligently signalled the motorman to go ahead before the plaintiff had time to board the car, and the car started with a jerk throwing plaintiff to the street.

A street railway company does not owe any duty to a person as a passenger until he has placed himself in such position that, under the rules of law, he is to be treated as a passenger. And whenever any person who intends to become a passenger upon a street car has signalled the car to stop, and places himself in such position that the conductor, using his ordinary senses, is able to discover, learn and know that the person is intending to become a passenger, then it is the duty of the conductor to treat him as such and to give him a reasonable opportunity to board the car. Unless the person so intending to become a passenger does so place himself in such position that the conductor may reasonably know and understand that he intends to become a passenger, there is no duty owing to such person on the part of the company, and it must appear in this case that the plaintiff did place himself in such position that the conductor had reasonable opportunity to know and learn that he was intending to board the car.¹

¹ *Lawrence v. Ry. & Light Co., Franklin Co. Com. Pleas.* Kinkead, J.

CHAPTER CXXXVI.

SURETIES.

SEC.

2327. Liability of sureties on bond of agent, where agent had previously defaulted — Duty of company to sureties.

SEC.

2328. Contract strictly construed—
When creditor accepting sureties bound to inform them as to the business of suretyship — Security for pre-existing debt.

Sec. 2327. Liability of sureties on bond of agent, where agent had previously defaulted—Duty of company to sureties.

“If A. B., at and before the time the bond was required of him, was intentionally and dishonestly a defaulter to the company, as to moneys intrusted to it, which he had received as its agent, and that the witness acted for said company in demanding and receiving the bond, and, before receiving the same, either knew of such default, or if he did not know it, believed upon reasonable and reliable ground of information or belief, that such default existed, then, if suitable and reasonable opportunity existed, it was the duty of the witness, as the agent of the company, to make known to the sureties, upon the bond such fact of A. B.’s delinquency, or witness’ belief of such delinquency, before accepting the bond, although witness did not know before the bond was signed by the sureties who they were to be, and, as witness did not give such information, if the sureties, in signing the bond, acted under a belief from its recitals that the company considered A. B. a trustworthy person, and would not have signed the bond but for such belief, then the plaintiff can not recover against the sureties, or either of them.

“But if A. B. had not been a defaulter at the time of the acceptance of the bond by witness, or if he was so by mere mistake, or other cause not involving intentional wrong, and the witness, at the time aforesaid, knew or believed such delinquency existed, it was not the duty of witness to make this knowledge or belief known to said sureties, or either of them, and his failure to do so would not vitiate the bond.

“Or if witness was, at the time of accepting the bond, at such a distance from the said sureties that, under the circumstances shown by the testimony, he could not reasonably inform them of such delinquency, he was not bound to give them this information, although the agent had been dishonestly a defaulter, and the witness knew or believed that fact, and his failure to do so would not vitiate the bond or prevent plaintiff from recovering upon it against the defendants.”¹

¹ Dinsmore v. Tidball, 34 O. S. 411.

Sec. 2328. Contract strictly construed—When creditor accepting sureties bound to inform them as to the business of suretyship—Security for pre-existing debt.

The law applies a strict construction to contracts of suretyship. If a creditor induces a surety to enter into a contract of suretyship by any fraudulent concealment of material facts, the surety will be thereby released. The contract of suretyship, as a general rule, is for the benefit of the creditor, while the surety derives no advantage from it. Hence the law imposes upon the creditor the duty of dealing with sureties, at every step, with the utmost good faith. It can not always be said that the creditor before accepting sureties, is bound to inform them concerning information touching the business of the suretyship which may be within the knowledge of the creditor, and which might increase the risk of the undertaking on the part of the surety. This will depend upon the peculiar circumstances of the given case. If there is nothing in the circumstances surrounding the business of the suretyship to indicate that the

sureties are being misled, or deceived, or that they are entering into the contract in ignorance of facts materially affecting the risks thereof, then the creditor in such case is under no obligation to communicate facts within his knowledge, but may assume that the sureties know the material facts or that they are willing to assume the risks of the undertaking if they sign the note.

But if the creditor knows, or has good grounds for believing, that the sureties are being deceived or misled, and he believes that the sureties may not enter the relation and assume the obligation, if they become aware of material facts known to the creditor and the debtor, including their intent and purpose, that is the debtor and creditor, and the creditor has an opportunity before accepting the undertaking, to inform the sureties of such material fact, good faith and fair dealing demands in such case that the creditor should make such disclosures to them; and if he accepts the contract under such circumstances without doing so, the surety may avoid the same.

In the foregoing statement of the law, in its application to this case, the jury will understand that when the court uses the term "creditor" it comprehends the plaintiff, and that the debtor or principal applies to H., and sureties to the defendants.

Whether a failure of the creditor in such cases to disclose facts known to him and not known to the sureties, may be deemed fraudulent, will depend largely upon the character of the business to which the suretyship relates, and the knowledge, opportunity, situation and relation of the sureties thereto. It is a conceded fact in this case that the principal, H., was in debt to a considerable amount on a long-standing, pre-existing obligation on a running account for merchandise sold and delivered by plaintiff to him, which was giving plaintiff some concern. It is also a conceded fact that the plaintiff credited the amount of the \$—— note to the account of H., and kept on furnishing goods to H. until he had exceeded the credit secured by plaintiff by the \$—— note. It is conceded also that plaintiff sold the note to a third party who discounted it in bank, and upon failure of the defendants to pay the same at maturity, plaintiff

took up the note in bank, paying the amount to the bank then due upon it.

Now, gentlemen, applying these fundamental principles of law which I have given you to this case, if it appears to you from the evidence that after H. and P., the latter acting within his authority for the plaintiff, learned that H. could not obtain a loan upon the note with the defendants as sureties, that H. and plaintiff obtained this note with the defendants as sureties, and that the same was delivered and accepted by plaintiff with the intent and purpose on their part to apply it as a credit on the old and pre-existing debt of H. to plaintiff, and to hold the balance as security for future indebtedness; and if it also appears that the defendants did not know of the pre-existing debt of H. to plaintiff, or of the amount and extent thereof, and if plaintiff knew, or had good grounds for believing, that defendants were signing and did sign the note in ignorance of the pre-existing debt of H., and the amount and extent thereof, and that they did not know that the same was to be applied as a credit upon that debt, and plaintiff failed to inform them concerning the same, and H. and plaintiff, through its agent, P., used any artifice to conceal from the defendants their purpose to use it as a credit on their own debt, and if the jury find that defendants would not have signed the note had they known of the existence of the pre-existing debt and of a purpose to use the note to liquidate the same, and for future credit; and if the jury find that defendant signed the note both without knowledge of the nature and extent of the pre-existing obligation, and without knowledge of the inability of H. to pay a loan upon the proposed note with defendants as sureties, and without knowledge of the intent and purpose of plaintiff to apply the note to the credit of the pre-existing debt and account of H. in the manner in which the undisputed evidence shows it was done, then the jury should find that the plaintiff had been guilty of fraudulent concealment of material facts releasing defendants from their obligation, and your verdict should be for the defendants.

But if, on the other hand, you find that the defendants had knowledge of the pre-existing debt of H. to plaintiff, or if you find that the circumstances were such, by the application of the principles of law heretofore given you, that there was no good reason for believing that the defendants were being misled in the matter with reference to the pre-existing debt, and that they knew the purpose for which the loan was to be used, and was used, then the fact that it was used to secure a pre-existing debt of H. will not operate as a release to them.¹

¹ *David Davies Packing Co. v. Trautman, et al.*, Franklin Co. Com. Pleas. Kinkead, J. Authorities on pre-existing debt, etc. *Fassnacht v. Emsing*, Gagen county, 18 Ind. App. 80, 63 Am. St. 322' and note, p. 327; *Warren v. Branch*, 15 W. Va. 21; cases cited p. 333 of 63 Am. St.; *Lee v. Jones*, 17 Com. B. N. S. 482; *Stone v. Compton*, 5 Bing. 142; *Pedock v. Bishop*, 3 Barn. & C. 605; *Hamilton v. Walson*, 12 Clark & F. 109; *Wason v. Waring*, 15 Beav. 151; *Daughty v. Savage*, 28 Conn. 146; *Comstock v. Gage*, 81 Ill. 328, 6 N. P. 31, 3 O S. 302.

CHAPTER CXXXVII.

TENDER.

SEC.

SEC.

2329. Definition and object of tender.

Sec. 2329. Definition and object of tender.

The jury are instructed that when a party has entered into an obligation (either) to pay money, (or) to deliver goods, (or) to perform services, and, by some outward expression or act, in effect tenders or offers to perform the obligation in the manner agreed upon, the law considers that he has, in fact, substantially performed it. A tender is an offer (either to pay a debt or) to perform an obligation. To be effectual, the party making it must continue ready and willing to pay or perform the obligation, and must have the ability to perform. The effect of a valid and legal tender is, that the party acknowledging an indebtedness of the amount tendered (or of an obligation to perform an act) is to stop the running of interest, and to protect him from the payment of costs.¹

To be effective as a tender it must be kept good by the payment of the money into court for the plaintiff;² and it must be actually offered to the person to whom it is made, so that he can see it,³ and it must be the amount actually due.⁴

If you find from a preponderance of the evidence that the defendant has complied with all these requirements, then you may be justified in finding that a tender has been made. But if you find that the defendant merely expressed a willingness or readiness to pay without offering a definite sum or the amount actually due, and that he did not actually produce and offer to pay, and that he did not keep such offer good by tendering or depositing it in court, then you can not find that a tender was made.⁵

The defendant need not, however, actually produce the money where the plaintiff has done something which would make it unnecessary, as where the plaintiff says that the defendant need not produce it, that it would not be accepted.⁶

¹ Halpin v. Ins. Co., 118 N. Y. 165; Tiedman on Sales, sec. 139.

² Armstrong v. Spears, 18 O. S. 373.

³ Pinney v. Jorgensen, 27 Minn. 26; Hoffman v. Van Dieman, 62 Wis. 362.

⁴ 5 Mass. 365.

⁵ Must actually produce the money, 41 Cal. 420, 8 Neb. 507, 46 Barb. 227.

⁶ 8 O. 173, 8 Neb. 507, 10 Cush. 267.

CHAPTER CXXXVIII.

WILLS.

SEC.

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2331. Requirements of valid will.

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1. Who may make a will.

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SEC.

3. Testator must be of sound mind and memory.

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2340. Moral depravity—As affecting mental capacity—Notable charge of Longworth, J.

2341. Undue influence—What constitutes — Another form.

2342. Undue influence — Longworth, J.

2343. Undue influence — Persuasion to make will—Flattery—Appeals to affections.

2344. Nuncupative will — Words written down not those spoken.

Sec. 2330. Who may make a will.

Under the law of Ohio any person of full age and sound mind and memory, and not under any restraint, having any property,

personal or real, or any interest therein, may give and bequeath the same to any person by last will and testament, lawfully executed.¹

The law further requires that the will in controversy being a written one, shall be signed at the end thereof by the said (testator), or by some other person in his presence by his express direction, and shall be attested and subscribed in the presence of said (testator), by two or more competent witnesses, who saw the said (testator) subscribe or heard him acknowledge the same.²

¹ Code, sec. 5914.

² Cyrus Newby, J., in *Graham v. Graham*, Highland Co. Com. Pleas. R. S., sec. 5916.

Sec. 2331. Requirements of a valid will.

In order that it may be his last will and testament, he must have been of full age, that is, at least twenty-one years of age, at the time of executing it, of sound mind and memory, and not under any restraint, and have property, real or personal, or some interest therein. It is further necessary that the paper produced as his will should have been signed at the end thereof by the said (testator), or by some other person in his presence, and by his express direction, and attested and subscribed in the presence of said (testator), by two or more competent witnesses, who saw the said J. G. subscribe or heard him acknowledge the same. If any one of these requisites should be lacking in the execution or attestation of the paper produced as the last will and testament of said (testator), it would not be a lawful will, and its probate should be set aside.¹

¹ Newby, J., in *Graham v. Graham*, Highland Co. Com. Pleas.

Sec. 2332. Witnesses need not see testator sign if acknowledged before them.

It is not required that the subscribing witnesses to the will should have signed the same in the presence of each other,¹ but they must have subscribed the same in the presence of the testator. Nor is it required that both subscribing witnesses should

have been present at the signing of the paper claimed to be the will of said (testator) or, in fact, that either should have seen the said testator subscribe the instrument, but in case either should not have seen the said testator subscribe said paper, then it becomes necessary that the testator should have acknowledged to the witnesses that the paper which he had signed was his last will and testament.² This acknowledgment by the testator is not required to be in any particular form of words, or in any specified manner. But the testator must, by some words, conduct, or the attending circumstances, give the witnesses to understand that he acknowledges the signature to the instrument as his, and the instrument itself as his will.³

¹ Raudebaugh v. Shelley, 6 O. S. 306.

² Reynolds v. Shirley, 7 O. (pt. 2) 39.

³ Newby, J., in Graham v. Graham, Highland Co. Com. Pleas. See charge in Haynes v. Haynes, 33 O. S. 610.

There *need be* no precise form of acknowledgment. "It is not necessary that any precise form of words should be used by the testator in acknowledging either his signature or will. It will be sufficient if by signs, motions, conduct, or the attending circumstances, he gives the attesting witnesses to understand that he acknowledged the will and the signature to be his. If, therefore, you shall find from the evidence that Mr. H. authorized Mr. A. to sign his (H.'s) name to the will when no other witness was present, and A. did so sign the will in the presence of H., and afterward, on the same day, Mr. H., either by words or signs, motions, conduct or the attending circumstances, give the attesting witnesses to understand that he acknowledged the signatures, and requested them to attest the will, and that they did so attest the will in his presence, this will be a sufficient acknowledgment and attestation of the signature, and your verdict should be for the defendants and the will." *Id.*

Sec. 2333. Declarations of testator to show condition of mind.

The declarations of a testator made after the execution of his will are admissible only for the purpose of showing his condition of mind, and must not be used to prove the fact that undue influence or fraud were used to induce him to make the will in question, except in so far as they may evidence a condition of mind easily subjected to such influence at the date of his will. You must bear in mind, however, that the verbal statements,

admissions or declarations should be received with great caution. The evidence, consisting as it does in mere repetitions of oral statements, is subject to much imperfection and mistake; the party testifying to them may be misinformed or may have misunderstood the testator. It frequently happens, also, that the witness by altering a few of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say.¹

¹ Newby, J., in *Graham v. Graham*, Highland Co. Com. Pleas. The declarations of the testator, made at about the time of executing his will, are admissible to show his capacity and the state of his affections. *Rule v. Maupin*, 84 Mo. 587.

A testator's declaration before making his will that his children lacked natural affection are admissible to show his state of mind. Whatever is material to prove the state of one's mind and what were his intentions can be shown by his declarations and statements, the truth of such statements being immaterial. *Wilkinson v. Service*, 249 Ill. 146, 94 N. E. 50, Ann. Cas. 1912, A. 41. See Page on Wills, secs. 400, 423.

Sec. 2334. Instructions to jury in contest of will.

1. *The issue.*
2. *Order of probate, prima facie evidence—Burden on plaintiff.*
3. *Degree of proof—Preponderance—Probabilities.*
4. *Capacity to make a will—Essentials.*
5. *Proof of undue influence.*
6. *What constitutes undue influence and restraint.*
7. *Declarations after making of will.*
8. *Directions as to verdict.*

1. *The issue.* The issue whether or not the paper writing is the last will and testament of W. F. R., is made up by an answer filed by T. B. R., in which she denies the invalidity of the will, denying that W. F. R. was of unsound mind, or that he was mentally incapacitated for making a will. She denies that said decedent was coerced into signing the paper writing by her undue influence.

The questions for the jury to determine, therefore, are whether W. F. R. at the time of making and executing the paper writing purporting to be his last will and testament was of sound mind and memory; whether or not he signed the paper of his own volition; whether he signed it under undue influence or duress exercised over and on him by T. B. R.; and whether the paper writing is his last will and testament.

2. *Order of probate, prima facie evidence—Burden on plaintiff.* The law of this state is that the order of probate of a will is *prima facie* evidence of the due attestation, execution and validity of the will. That is, such will and order of probate furnish such an amount of evidence that, were no further evidence offered, the defendants would be entitled to a verdict sustaining the will as probated by the probate court.

The parties having admitted in this case that the will in question was properly attested and executed so far as the formal requisites prescribed by law are concerned, the only question at issue are those relating to the mental capacity of the deceased, and to the alleged undue influence exerted upon him at the time of the execution of the will. The jury is therefore instructed that as the order of probate is *prima facie* evidence of the due execution and validity of the will, it therefore devolves upon the plaintiff to prove by a preponderance of the evidence that at the time the will was so signed, acknowledged and attested the said W. F. R. was not of sound mind and memory, or that at the time the said testator was under restraint or undue influence.

If the plaintiff proves by a preponderance of the evidence either of these things as to which the burden of proof is on him, then you should return a verdict finding the paper produced not to be the last will and testament of the deceased. But if the plaintiff has failed to prove that the deceased was not of unsound mind and memory, or that at the time the will was executed he was not under any restraint or undue influence, you should in that case return a verdict sustaining the will.

3. *Degree of proof—Preponderance of evidence—Probabilities.* By a preponderance of the evidence is meant the greater weight

thereof. The evidence may be said to operate in favor of one party whenever the greater weight thereof, when freely and fully considered, is in favor of the claims of such party. The nature of controversies and testimony concerning the same is such that it is not always possible for a jury to be assured of the absolute truth of the facts in issue. Consequently, the rule of law with reference to the interpretation of the degree of evidence prescribed for civil cases, such as this one is, that the jury need not find the existence of any material fact to a degree of certainty, it being essential only that the probabilities when weighed by them, preponderate in favor of the fact which they find to be established by the proof. If the evidence in this case shows to your minds that it is more probable that the deceased R., at the time that he made and executed the will in question, was under restraint and undue influence, or was mentally incapable of making the same under the rules of law given you by the court, then and in that case the plaintiff will have to make out his case by a preponderance of the testimony. On the other hand, if the evidence should not show it more probable that the testator, R., was mentally unsound or was of unsound mind and memory, or that he was under unlawful restraint or influence, or if the evidence on these points be evenly balanced, in either event there would be no preponderance in favor of the plaintiff, and you should in such case return a verdict sustaining the will. The defendants are entitled to a verdict sustaining the will as probated, unless the preponderance of the evidence is in favor of the plaintiff on at least one of the grounds which they are required to establish as they are alleged in the petition of plaintiff, by a preponderance of the evidence.

4. *Capacity to make a will—Essentials.* With reference to the capacity of a person to make a will, the jury is instructed that it is necessary that a man shall have mental capacity sufficient for the transaction of the ordinary affairs of life, and if he possesses this, though he may be feeble in mind and body from sickness, old age or other cause, he has a legal right to dispose of his property as he sees fit without regard to the wishes

of others. The law does not undertake to test a man's intelligence or to define that exact quality of mind and memory which a testator must possess, but it does require him to be capable of knowing the extent and value of his property, the names or relationship of those who are natural objects of his bounty, their deserts in reference to their conduct or treatment toward him, their conditions and necessities, and he must be capable of retaining all these facts in his memory long enough to have the will prepared and executed.

He may not have sufficient capacity to make a contract, but he must understand substantially what he is doing; the nature of the act in which he is engaged, the extent of his property, the relations of others who may be or ought to be the objects of his bounty, and the scope, bearing and effect of his will, and he must have sufficiently active memory to collect his mind without prompting; he must understand the elements of the business to be transacted, and hold them in his mind a sufficient length of time to perceive and consider their obvious relations to each other, and be able to form some rational judgment in reference to them, although he may not be able to understand and appreciate these matters in all their bearings as a person in sound and vigorous health of mind and body would be.

In determining the question of mental capacity, it is your duty to take into consideration the provisions of the will itself in connection with all the other testimony, and also the surrounding circumstances, not only as bearing on the question of mental capacity, but that of undue influence as well.

It is not necessary that the testator be shown to be technically insane. Weakness of intellect or loss of memory, whether occasioned by a disease or great bodily suffering, or infirmity, or from all these combined, may render the testator incapable of making a valid will, provided such weakness of intellect or loss of memory really and in fact disqualified him from knowing or appreciating the consequences and effect of his act and of fairly considering and weighing the just deserts of the natural objects of his bounty. But weakness of mind or memory arising from

any cause, will not disqualify the testator from disposing of his property by will, unless such weakness goes to the extent of rendering him incapable of appreciating the nature and extent of his property, the rights and claims of those who are the natural objects of his bounty, and the nature and consequences of the will he is about to make.¹

5. *Proof of undue influence.* The proof of undue influence can seldom be made by direct evidence, and the law does not require it; but the circumstances must be such as to justly lead to the inference that undue influence was employed and that the will did not express the real wishes of the testator. You should look into the character of the mind of the testator, his manner of living, the relations which he sustained to all members of his family, and the provisions of the will itself. While the apparent inequality or injustice, even, in the provisions of a will, are not of themselves a sufficient reason for annulling the will if otherwise valid, yet those provisions may present potent circumstances reflecting both upon the testator's capacity as well as the operation of influence upon his mind, though a person perfectly rational and sound may be subject to control by influence from others. Therefore, it is not necessary in proving undue influence or restraint that there should also be proof of incapacity, though the proof of one may tend to prove the other. While you may consider the provisions of the will, still you must remember that it is not your province to pass on the justice or the fairness thereof, but its provisions may be considered in connection with all the testimony and the circumstances surrounding the testator, for the purpose of determining whether it has such existence. You are not at liberty to make a will for the testator, but simply to decide whether the one he has attempted to make is sanctioned by and fulfills all the requirements of the law.²

6. *What constitutes undue influence and restraint.* To constitute undue influence and restraint, it must appear that there was such influence and restraint as caused the execution of the will by the testator against his own desires in the matter. It must appear by a preponderance of the evidence that such undue

influence and restraint was practiced with reference to the will, and it must have affected or brought about the provisions of the will, or some of them. Unless it has in some manner affected the making of the will, or some of its provisions, it can not invalidate it. It must destroy the free agency of the testator. It is not required that any physical force should be used, but any restraint, or threats, or influence brought to bear upon the testator, or persistent importunities which he has not the strength to resist, if exerted so as to coerce him against his desire and purpose in making his will, or any of its provisions, is undue influence within the meaning of the law. It matters not how slight or how great the influence may be, so long as it destroys the free agency of the testator. It is immaterial what argument, influence or persuasion were brought to bear upon the testator, provided that in making his will he carried into effect his own will and intentions and not those of another.

It is not unlawful for a person by influence, intercession and persuasion to induce a will in his or her favor, neither is it unlawful to induce a testator to make a will in one's favor by fair speeches and kind conduct, for this does not amount to that kind of compulsion, improper conduct or undue influence which in a legal sense will render the will invalid. To have such an effect it must amount to a moral force and coercion destroying free agency.

The test of the unlawfulness of the influence is its effect upon the testator's free agency. It must not be the influence of affection and attachment, nor the mere desire to gratify the wishes of another, but the undue influence and restraint required in order to render the will invalid, must be of such character and degree as to prevent the exercise of that discretion and judgment which are essential to a sound and disposing mind.

Undue influence, like incapacity, must be shown to exist at the time of making the will. To determine this, the jury must consider the testimony and look to the facts and circumstances occurring both before and after the execution of the will as reflecting one way or the other upon the question whether undue

influence may or may not have existed or operated upon the testator at the time he made his will.³

7. *Declarations of testator after making of will.* The declarations of a testator made after the execution of his will, are admissible only for the purpose of showing his condition of mind, and the evidence of this character which the court permitted to be offered in this case must not be used to prove the fact that undue influence or fraud was used to induce the testator in question to make the will in controversy here, except in so far as such declarations may evidence or show a condition of mind on the part of the testator which was easily subjected to such influence at the date of his will. The jury will further bear in mind, too, that it is a rule of law that probable statements, admissions, or declarations are to be received and considered by the jury with great caution. The evidence consisting, as it does, in mere repetitions of oral statements, is subject to much imperfection and mistake. The parties testifying to them may be misinformed, or may have misunderstood the testator. It frequently happens, also, that the witness by altering a few of the expressions that are used, caused an effect on the statement completely at variance with what the party actually did say. These are the reasons for the rule of caution sanctioned by the law concerning such testimony. You will bear in mind, however, that as already stated, such declarations are proper evidence to be considered by you in determining the condition of the mind of the deceased, for the purpose of enabling you to decide whether or not it was in such condition, or of such character as to be easily subjected to the influences such as are averred in plaintiff's petition and alleged to have been exerted by R. at the time of the execution of the will.⁴

8. *Directions as to verdict.* Gentlemen of the jury, these are all the rules of law which the court wishes to give you to govern and aid you in determining the issues involved in this case. You will bear in mind that you are the judges of the weight and of the credibility of the witnesses. You may consider the appearance of the witness on the stand, his or her manner of testify-

ing, their apparent candor, intelligence, or lack of intelligence, relationship, business or otherwise, to the party, their interest, if any, appearing from the evidence, their temper, feeling or bias, if any; and all other circumstances appearing in connection with the testimony on the trial.

If, gentlemen, after a full, fair and impartial consideration of all the evidence in the case, without feelings of prejudice or favor, the jury should find that the deceased W. F. R. was of sound mind and memory and not under any restraint, your verdict should be one sustaining the validity of the will. If, however, you should find by a preponderance of the evidence that the deceased was, as alleged in the petition, either of unsound mind or memory, or that he was at the time of the execution of the will under restraint or duress exercised and exerted as alleged, your verdict should be for the plaintiff, and you should in such event hold the will to be invalid and void.⁵

¹ Physical weakness, failure of memory, or unimportant mistakes in business do not show incapacity. *Wilson v. Wilson*, 7 N. P. (N.S.) 435, 14 C. C. (N.S.) 241. Mental capacity—essentials. *Wadsworth v. Purdy*, 12 C. C. (N.S.) 8, 21 C. D. 110. Locomotor ataxia. *Gregg v. Moore*, 14 C. C. (N.S.) 5.

² Page on Wills, secs. 132 and 421. The nature of the will may be considered by the jury as a circumstance. *Id.*, sec. 426; *Crandall's Appeal*, 63 Conn. 365; *Pooler v. Christman*, 145 Ill. 405.

³ Undue influence, elements of. Page on Wills, secs. 127-132.

⁴ Page on Wills, secs. 361-423.

⁵ *Troutman v. Reed*, Franklin Co. Com. Pleas, Kinkead, J.

Sec. 2335. Insane delusion.

Your attention has been directed to the claim of the contestants that C. K. O. at the time of executing the paper writing was possessed of an insane delusion concerning the chastity of his wife and the legitimacy of her daughter L., the plaintiff.

An insane delusion is defined as a diseased condition of the mind in which persons believe things to exist which exist, or in the degree they are conceived of, only in their own imagination with a persuasion so firm and fixed that neither evidence nor argument can convince them to the contrary.

Whenever a person has conceived something extravagant to exist which has still no existence whatever, but in his own heated imagination; and whenever at the same time having so conceived he is incapable of being or at least of being permanently reasoned out of that conception, such person is said to be under a delusion.

The insane delusion must consist at least of a mistake of fact. In order to be insane delusion, the mistake must be one which is not based upon evidence or at least without any evidence from which a sane man could draw the conclusion which forms the delusion. And the delusion must be such as can not be removed or permanently removed by evidence. In most cases of delusion the delusion founds itself originally on some slight circumstance the magnifying of which beyond all reasonable bounds is nearly or quite as good in proof of its being a delusion as the taking some absurd prejudice which is utterly unfounded or that rests upon no basis.

Such a delusion is called partial insanity. The law recognizes that there is a partial insanity and a total or general insanity. That a man who is very sober and of right understanding in all other things may in some one or more particulars be insane; and that such partial insanity may exist as it respects particular persons, things or subjects, while as to others the person may not be destitute of the use of reason. And such partial insanity, such insane delusion, if found to have controlled the testator at the time of making his will, which causes him to make a will he would not have made but for such delusion, would invalidate the will as if made under the effects of an insanity ever so general.

The existence in the mind of the testator of mere delusions which do not affect the natural or selected objects of his bounty is not necessarily inconsistent with testamentary capacity.

The jury is instructed that before this will can be set aside upon the ground of testator's unsound mind, the plaintiff must show not only the insane delusion claimed, but that such insane delusions affected and controlled the provisions of the will as

to M., C. or L. O. If it existed but did not affect or influence the provisions as to them or either of them, they can not be heard to complain in this case.

If you find from the evidence that although C. K. O. had sufficient capacity to attend to the ordinary business affairs of life, yet if the will here offered was made at a time when the testator C. K. O., was laboring under the influence of insane delusions concerning the legitimacy of the plaintiff and the chastity of his wife, plaintiff's mother, and is the product of such delusions or partial insanity, and that he was controlled in the making of said will by said delusions, and which caused him to make a will which he would not have made but for such delusions, then said C. K. O. was not of sound mind and memory as is contemplated and required by the law, and any paper purporting to be a will executed by him under such circumstances is not a valid will and the jury should, in that event, find the issue for the contestants.

In determining the question of mental capacity, it is your duty to take into consideration the provisions of the will itself, in connection with all the other testimony and also the surrounding circumstances not only as bearing on the question of sound mind, but that of undue influence as well. The fact that the testator made no provision in his will for the children of his second wife, may be considered in connection with these questions. And if it appear from the evidence that the testator before his death sought to have such children come and live with him, offering to provide for them all the necessary comforts of life, but that they refused to do this and neglected to come and see him, of which he complained, this also may be considered as bearing on the question of the soundness of his mind, whether testator was at the time of making his will laboring under insane delusions and was controlled by such, as well as that of undue influence.¹

¹ *Luella Ott, an infant, etc., v. Elizabeth E. Stein, et al.*, Com. Pleas Court, Franklin Co., Ohio. Rathmell, J.

Eccentricities, peculiarities or delusions must not affect either the natural or selected objects of his bounty. *Wadsworth v. Purdy*, 12 C. C. (N.S.) 8, 21 C. D. 110. Insane delusion. Page on Wills, secs. 104-109.

Sec. 2336. Old age and sickness as affecting mental capacity.

The law requires, as I have said to you, that the testator shall be of sound mind and memory. This requires that he shall have sufficient mental capacity to transact the ordinary business of life, and if he possesses this capacity, then he has the legal right to dispose of his property by will without regard to the wishes of others. The question for your determination upon this point is, was J. N. II. at the time of the execution of this document of sound mind and memory? It is immaterial how soon thereafter he may have become of unsound mind and memory, if at the time of the execution of the document he was of sound mind and memory. The purpose of the introduction of evidence touching his condition prior to and subsequent to the date of the execution of the instrument is to reflect light upon and enable you to determine what his condition was at the time of the execution thereof.

J. N. II. was not incapable of making a will merely because he may have become enfeebled from age, sickness or other causes so long as he retained sufficient mental capacity to transact the ordinary business affairs of life. The law does not require that he should have been able to conduct long-continued business transactions. If, however, his mind had become enfeebled from age, sickness or other causes so that its action was not such as it would have been, had his mental faculties been in a normal condition and so enfeebled and weakened that the jury finds that the paper writing does not express the real intention of a sound and disposing mind, then the paper purporting to be the last will and testament of J. N. II. would not be his valid last will and testament.

The law also requires that the testator's memory be sound. A man may reason with apparent soundness upon the facts known to him and yet that faculty of the mind known as memory

may be so weakened that facts formerly known to him may not be in his mind. Under such circumstances his ignorance of facts may cause him to act in an entirely different way from what he would have acted had such facts been known to him. The law, therefore, requires that the testator shall be able to hold in his mind the nature and extent of his property, the persons who would be the natural objects of his bounty, and their relationship to him and their conditions and necessities.¹

¹ John Hart, *et al.*, v. William Hart, *et al.* Com. Pleas Court, Franklin Co., O. Bigger, J.

Sec. 2337. A concise charge in will contest in different form, embracing—

1. *Who may make a will.*
2. *Probate of will prima facie evidence—Burden of proof.*
3. *Testator must be of sound mind and memory.*
4. *Testator must know extent and value of property, and natural objects of his bounty.*
5. *Provisions of will to be considered.*
6. *Need not be technically insane—Weakness of intellect sufficient when*
7. *Undue influence.*
8. *Inequality or injustice of will.*

1. *Who may make a will.* Under the law of Ohio any person of full age and sound mind and memory and not under any restraint may make a will and give and bequeath his property, real or personal, to any person or organization.

2. *Probate of will prima facie evidence—Burden of proof.* Where a will has been probated by the probate court, as in this case, that fact is *prima facie* evidence of the due attestation, execution and validity of the will, and the duty, therefore, devolves upon the plaintiff to prove to you by the preponderance, that is to say, by the greater weight of the evidence, that the alleged will is not the last will and testament of J. S.

3. *Testator must be of sound mind and memory.* To make a valid will, J. S. must have been at the time he executed this last

will of sound mind and memory. To be of sound mind and memory, as understood in law, it was sufficient if J. S. at that time understood the nature of the business in which he was then engaged, knew, unaided from any outside source or suggestion, what property he then owned and was disposing of, and realized the relationship which existed between him and those who had a claim upon his bounty and was capable of making a rational selection among them. Since the order of probate of this will raised a presumption that the paper so probated is the valid last will and testament of J. S., a verdict setting aside the said will on this ground can not be returned by you unless the evidence adduced by the plaintiff outweighs both this presumption arising from the order of the probate court admitting the will, and also the evidence adduced by the defendants.

4. *Testator must know extent and value of property, and nature of objects of his bounty.* The law does not undertake to test by any specific method a person's intelligence and to define the exact quality of mind and memory which a testator must possess, but it does require him to be capable of knowing the extent and value of his property, the names and relationship of those persons who are the natural objects of his bounty, their deserts with reference to their conduct and treatment of him or her, their conditions and necessities, and be capable of retaining all these facts in his memory sufficiently to have the will prepared and executed. His mental capacity is not to be measured by any exclusive test of his capacity to do any other particular act or business, but his mental capacities with reference to other acts shall be considered by you in determining the question before you here.

In making this alleged will J. S. must at that time have had sufficient strength and clearness of mind and memory to know, without prompting, the nature and extent of the property of which he was about to dispose, the nature of the act which he was about to perform, the names and identity of the persons who were the proper objects of his bounty and his several relations towards them. If a person persistently believes supposed facts

which have no real existence against all evidence of probability and conducts himself upon an assumption of their existence, then, so far as those facts are concerned, he is of unsound mind.

The claim is put forth by the plaintiff that at the time he made this will, J. S. had an arbitrary belief, without cause or reason, that she was not his child. To properly measure J. S.'s mental condition in this regard, you will consider all the evidence with reference to the relationship existing between him and the plaintiff.

5. *Provisions of will to be considered.* In determining the general question of the mental capacity of J. S., it is your duty to take into consideration the provisions of the alleged will itself in connection with all the other testimony and all the surrounding circumstances, and this you will do in determining the question of undue influence as well.

6. *Need not be technically insane—Weakness of intellect sufficient when.* It is not necessary that the testator should be shown to be technically insane; weakness of intellect or loss of memory, whether occasioned by disease or bodily suffering or infirmity or from all or some of these combined, may render a man incapable of making a valid will, provided such weakness of intellect or loss of memory really and in fact disqualified him from knowing or appreciating the consequences and effect of his act and of fairly considering and weighing the just deserts of all the natural objects of his bounty. Weakness of mind and memory will not disqualify one from disposing of his property by will unless such weakness goes to the extent of rendering him incapable of appreciating the nature and extent of his property or the rights and claims of those who are the natural objects of his bounty and the nature and consequences of the will he makes.

7. *Undue influence.* Capacity to make a will involves freedom from such undue influences as constrain the party to act against his will or subdue his will until it ceases to act for itself and acts under the dictates of the will of another. This capacity may be destroyed or overcome without actual force or coercion.

Any improper or wrongful restraint, machination or urgency or persuasion whereby the will of a person is overpowered and he is induced to do or forbear an act which he would not have done or forborne, had he been left to act freely, is undue influence. Again, undue influence has been defined as any influence brought to bear upon a person entering into an agreement or consenting to a disposition of property which, having regard to the age and capacity of the party, the nature of the transaction, and all the circumstances of the case, precluded the exercise of free and deliberate judgment. It is not necessary that undue influence should have been practiced at the time of making the will, but it is sufficient if the will was made after the influence was exerted and as a result thereof, and while the testator was under its general controlling and continuing influence. If J. S. was by undue influence induced to make this alleged will, then, I charge you that this alleged will was not in fact his will and you must so find.

What might constitute undue influence with one person of weak mentality might not be undue influence at all with reference to another person of stronger mentality. Proof of undue influence must be made either by direct evidence or circumstantial evidence or both. Such evidence must be of such probative value as to lead justly to the inference that undue influence was employed and that the will did not express the real wishes of the testator. You will consider all the circumstances that have been brought forth in this case, look into the character of mind of the testator, his manner of living, his environments, his relations which he sustained to the members of his family and his other relatives, and the provisions of the will itself.

8. *Inequality or injustice of will.* Any apparent inequality or injustice is not a reason for annulling a will, if otherwise valid. You will consider such provisions, if any you find, along with all the other circumstances reflecting upon the testator's capacity, as well as upon the question of undue influence. As a matter of law, a person, however wealthy, has a right to give nothing even to his child or children.

In this charge and in the special charges, gentlemen of the jury, it is impossible in any one sentence or paragraph to frame a complete statement of the law, and therefore you will not seize upon or excerpt any one or more of the paragraphs with reference to the law governing this case, but you must consider all that the court has stated to you upon the subject.

You have heard the witnesses, gentlemen of the jury, who have testified. I need hardly say to you that you do not weigh evidence by the number of witnesses who shall testify, but by the credibility which you attach to the evidence adduced. You have seen the witnesses upon the stand, noticed their intelligence, their demeanor, their interest, if any they may have in the case, their bias and prejudice, if any, and each and every fact which will enable you to determine what degree of weight and credibility to attach to the evidence of each. You will consider this case dispassionately, without feeling or prejudice.

You must take the law as the court charges it to you, and in your jury room let no one of you advance any proposition of law inconsistent or at variance with the charge I have given you. You will give to these parties, therefore, a full, fair and conscientious consideration, so that when you have arrived at a verdict, it may be said that, in so far as the fallibility of human judgment permits, these parties have had a fair and impartial trial of this important cause.¹

¹ *Hickman v. Swarts*, Franklin Co. Com. Pleas. Dillon, J.

Sec. 2338. Consideration of the will itself.

While you may consider the provisions of the will, yet you must remember that it is not your province to pass upon the justice or the fairness thereof, but its provisions may be considered in connection with all the testimony and the circumstances surrounding the testator for the purpose of determining whether it has such existence. You are not at liberty to make a will for the testator, but simply to decide whether the one he has attempted to make is sanctioned by and fulfills all the requirements of the law.¹

¹ Page on Wills, secs. 132, 421, 426.

Sec. 2339. What, if anything, may be inferred from will.

Look first at the will. From the face of a coin you may infer the form of a die; when you read an anonymous manuscript, you may guess the author; when you see a footmark on the sand, you may conceive the animal that made it. So, from this will you may be able to infer something of the mind whose desires and interests it is said to have expressed; or you may find in it the expressions and desires of some other man than H. S. It is not the number of witnesses, but the weight of their testimony that should prevail with you, and of how much weight should be given to any testimony offered you are the sole judges.¹

¹ *Joslyn v. Sedam*, 2 W. L. B. 147.

**Sec. 2340. Moral depravity—As affecting mental capacity—
Notable charge of Longworth, J.**

1. *Right to make will.* To make a valid will it is not enough that the testator shall subscribe his name to it in the presence of witnesses. He must do it intelligently and voluntarily. It is a matter of experience that juries sometimes set aside a will because they do not approve of its provisions. It is the right of every man, which right can not be taken from him, to do what he wills with his own, unless the disposition he makes violates some law; and after his death neither court nor jury have the power to make for him a disposition of his property different from the disposition which he intended to make, upon any theory that such intended disposition was unjust and wrong.

2. *Foolish, capricious or unjust will.* If, therefore, a man of sound and disposing mind chooses of his own accord to make a capricious, a foolish, or an unjust will, such will must stand, the simple question in such case being whether he was of sound and disposing mind at the time when he made it.

3. *Mind weakened from age, excesses, disease.* If his mind at that time was feeble, perverted, or inert, whether weakened by age, excesses, disease, or other causes, that its action was not such as it would have been had the mind been in a natural con-

dition and sound, so that the jury may find that such action does not express *the real intent of a sound and disposing mind*, then the will, which is the result and product of such action, is not the last will and testament of the testator.

Everyone has observed that men in morbid conditions, where the brain is affected by disease, crazed by stimulants, or other causes, do things which at other times they would never have thought of doing, and for which they can hardly be held accountable, either in law or morally. In the eye of the law, a man's feelings, desires, and acts at such times are not considered to be the feelings, desires, and acts of the man.

Again, a man sometimes performs an act intelligently, but through feebleness of memory, is ignorant of some fact which if he had known would have caused him to act very differently. For example, suppose that one desires to divide his property equally among his children, and having three children, if so imbecile in memory as to suppose he has only two, and divides the property between these two, such disposition should not be considered the will of the testator, because it clearly does not express his intentions.

4. *Knowledge of property and objects of his bounty.* To make a will a man must have capacity to know and understand what property he has, who would naturally receive it, and whom he selects to receive it; he must be able to hold in his mind his property, the persons to whom he gives, and those, if any, from whom he withholds; he must be able to understand his true relations to his property, and to the natural objects of his bounty.

If he is not able to understand and comprehend these things, then he is incapable in law of making a will.

It is a very difficult thing to enter into the mind of a man and see what is there. It is a difficult thing to determine definitely, from the testimony of others, the true character, thoughts, and feelings which have in times past been the moving-spring of action in one whose body is now turned to dust. Nevertheless, by the light which human testimony gives, the endeavor must be made.

In all cases like the one at bar, the first and not the least important item of evidence bearing upon the condition of the mind of the testator is the will itself, and although, as I have said, the fact that a will is unjust, or wrong, or absurd does not of itself prove the incapacity of the testator to make a will, yet it is an item of evidence for the jury to consider as bearing upon the question, and it is for the jury to determine what weight shall be given it.

5. *Moral depravity—Dissolute habits.* Again, although mere moral depravity does not of itself unfit a man to make a will, yet a jury has a right to consider the fact of depravity in the testator, if satisfactorily shown, as a circumstance casting suspicion upon his soundness of mind.

The law does not declare that because a man is dissolute, passionate, unjust, and wanting the natural affection and parental instincts, and that he makes such a disposition of his property as he ought not to have made, these facts being found shall invalidate such disposition by will. I say the law does not declare that these things shall make his testament invalid, but it leaves to the jury, and to the jury alone, the right to say how much weight ought to be given to such facts, if they are found to be facts, in determining the condition of the testator's mind. The law very wisely provides that of these matters the jury shall be the sole judge. For whether strong or whether weak, no two human minds are exactly alike. The law does not pretend to furnish a foot-rule by which they shall be measured, but declares the few simple rules which I have given to you, and beyond these leaves the determination of the facts to be governed by those principles of reason and common sense which direct the minds of all just and honest men.

We all know that there are degrees of moral depravity as various as the degrees of moral excellence and virtue, and it may be that moral depravity may result in a perversion of the feelings, affections, inclinations, temper, habits, and moral disposition, without any lesion of the intellect or reasoning faculties; and it may be true that some human beings exist who, in

consequence of a deficiency of the moral organs, are as blind to the dictates of justice as others are deaf to melody; but whether such or a like condition of mind would amount to unsoundness, is a question of fact rather than law.

Mere depravity or wickedness, not amounting to mental unsoundness would not of itself, standing alone, affect the will of the testator.

It is claimed in this case that H. S. was a man morally depraved. I charge you that if you find that H. S. did not believe that any woman was virtuous; that all women were prostitutes; that they were created simply for the purpose of gratifying the lusts of man; that they were therefore able to support and maintain themselves out of the wages of sin; and that therefore no provision ought, in any case, to be made for them, and that, acting on this belief, he gave the bulk of his property to his son and not to his daughters, and that he made this disposition of his property by reason of this belief, then you would be justified in finding that his will is void.

However sound or strong the mind of a man might be in other directions, you would be justified in finding that the existence of such belief amounts to insanity or monomania.

I wish to impress upon you, however, what I have stated before, that to justify your setting this will aside upon such a state of facts as this you must find that such facts do exist. A less degree of moral depravity, although important as an item of evidence touching the question of soundness or unsoundness of the mind of the testator, would not of itself, standing alone, render him incapable of making a will; neither would this state of facts justify you in setting aside the will, unless you should find that they amounted to unsoundness of mind.

It is claimed that H. S. had, during his lifetime, suffered from severe attacks of disease; that he had been an intemperate drinker, and a man immoral and careless in all his habits of life; that he was peculiar and eccentric in his dress, his speech, and his manner. All these facts, if you find them to be facts, you have the right to consider as circumstances bearing upon the

question before you. His feelings, his sayings, his doings, the whole history of his life and death, as disclosed by the evidence, are proper testimony for your consideration, and you are the sole judges as to what and how much effect shall be given to any and all of them, keeping in view, however, that the question to be decided by you is narrowed down to this: do the papers purporting to be the will and codicil express the true desire and intent of the deceased, or, in other words, are they the act and product of a sound mind?¹

¹ *Joslyn v. Sedam*, 2 W. L. B. 147. Longworth, J.

Sec. 2341. Undue influence—What constitutes—Another form.

To constitute undue influence and restraint it must appear that there was such influence and restraint as caused the execution of the will by the testator against his own desire in the matter. It must appear by a preponderance of the evidence that such undue influence and restraint was practiced with reference to the will, and must have affected or brought about the provisions of the will, or some of them. Unless it has in some manner affected the making of the will, or some of its provisions, it can not invalidate it. It must destroy the free agency of the testator. It is not required that any physical force should be used, but any restraint, or threats, or influence brought to bear upon the testator, or persistent importunities which he has not the strength to resist, if exerted so as to coerce him against his desire and purpose into making his will, or any of its provisions, is undue influence within the meaning of the law. It matters not how slight or how great the influence may be, so long as it destroys the free agency of the testator. It is immaterial what arguments, influence, or persuasion were brought to bear upon the testator, provided that in making his will he carried into effect his own will and intentions, and not those of another.¹

Any degree of influence over another acquired by kindness and friendly attention can never constitute undue influence within the meaning of the law²

¹ As to unnatural dispositions, see Beach on Wills, sec. 113.

² Newby, J., in *Graham v. Graham*, Highland Co. Com. Pleas. As to undue influence, see Beach on Wills, secs. 107, *et seq.*

What constitutes. *Taphorn v. Taphorn*, 12 C. C. (N.S.) 180, 181, 22 C. D. 96.

Sec. 2342. Undue influence—Longworth, J.

The next question for your consideration arises upon the claim of the plaintiff that at the time of executing these papers the testator was acting under undue influence exercised over him by C. S. and others.

A will must be the expression of the wishes and purposes of the party who undertakes to make it; his friends and family may talk with him, advise him, entreat him, and importune him. This they may do, but if, when this is done, he intelligently weighs what they say, and having capacity, intelligently makes up his mind, determines his own purposes and declares his own intentions, it is no matter whether his own mind, when made, agrees with their advice or not.

If it is his own choice or preference, it is no matter whether it originated with himself or was suggested by others. If deceived by fraud, coerced by threats, or worried with importunity, or influenced by the constant pressure of a dominant mind, which constrains him into the execution of such a will as he would not, of his own inclination, have made, then the jury may find that undue influence has been exercised over the mind of the testator.

But in such cases the test is always this: Is the will the expression of the intent of the testator, or of some other person? Is it his will, or the will which some other man has made for him?

These are the two questions which you are called upon to decide, and the responsibility of deciding them truly and justly rests entirely upon you. There is a general conflict of testimony,

and a great mass of evidence has been submitted to you. The witnesses seem to have described two different persons, the one corrupt, degraded, and depraved, possessing attributes of the brute rather than the man, and in whom all manhood, if it ever had existed, has ceased to exist; the other a man who, although perhaps not affectionate, desired to be just, and, though perhaps not spotless in life, had no other or greater failings than such as are incident to ordinary humanity, and possessed some virtues not common among men.

It is for you to determine all questions concerning the weight of the evidence and the credibility of the witnesses, using the rules of law, as I have given them to you, as a lamp to guide you in disentangling the complicated obstructions which you may find in your way.¹

¹ *Joslyn v. Sedam*, 2 W. L. B. 147.

Sec. 2343. Undue influence—Persuasion to make will—Flattery, appeals to affection.

It is not unlawful for a person by honest intercession and persuasion to induce a will in his favor; neither is it unlawful to induce a testator to make a will in one's favor by fair speeches and kind conduct, for this does not amount to that kind of compulsion, improper conduct, or undue influence which, in a legal sense, would render the will invalid. To have such an effect it must amount to a moral force and coercion, destroying free agency. That which is obtained by argument, flattery, persuasion, and appeals to the affections, although influencing the testator's better judgment, does not necessarily vitiate the testator's will, unless his free agency be thereby destroyed, notwithstanding that but for such influence the will might not have been made. The test of the unlawfulness of the influence is its effect upon the testator's free agency. It must not be the influence of affection and attachment, nor the mere desire to gratify the wishes of another, but the undue influence and restraint required in order to render the will invalid must be

of such a character and degree as to prevent the exercise of that discretion and judgment which are essential to a sound and disposing mind.

Undue influence, like incapacity, must be shown to exist at the time of making the will. To determine this you must consider all testimony, and look to the facts and circumstances occurring both before and after the execution of the will as reflecting, one way or the other, upon the question whether undue influence may or may not have existed, or operated upon the testator, at the time he made his will.¹

¹ Newby, J., in *Graham v. Graham*, Highland Co. Com. Pleas. Undue influence. Beach on Wills, secs. 197, *et seq.*

Sec. 2344. Nuncupative will—Words written down not those spoken.

In a suit to test the validity of a nuncupative will, it is competent to prove that the testamentary words reduced to writing and probated are not the words spoken by the testator, and the following charge is, therefore, correct: If the evidence shows that the words actually spoken were substantially the same as the words written down by the witnesses, that would be sufficient; but, on the other hand, if the evidence should show that the words written down by the witnesses, as proved and probated, were not substantially the same as the words actually spoken, then the will could not stand, and their verdict should be for the plaintiff.¹

¹ *Bolles v. Harris*, 34 O. S. 38.

The jurisdiction exercised by court and jury in trying contest of a will is virtually that of a court of probate, charged with the duty of finally establishing or rejecting the will. It is a proceeding *inter partes* *Mears v. Mears*, 15 O. S. 96; *Converse v. Starr*, 23 O. S. 498; *Bolles v. Harris*, *supra*.

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